

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1942.

No. 3892.

ALBERT YAKUS,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS,
FROM JUDGMENT (HEALEY, J.), APRIL 30, 1943.

TRANSCRIPT OF RECORD.

LEONARD PORETSKY,
FRANCIS P. GARLAND,
JOSEPH KRUGER,

for Appellant.

EDMUND J. BRANDON,

UNITED STATES ATTORNEY,

for Appellee.

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v.

UNITED STATES OF AMERICA,
APPELLEE.

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 16076. CRIMINAL.

UNITED STATES by Indictment,

v.

ALBERT YAKUS.

INDICTMENT.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the first Tuesday of December in the year of our Lord one thousand nine hundred and forty-two

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that

COUNT ONE:

1. Albert Yakus of Boston in the District of Massachusetts, is made defendant herein. The said defendant at all times herein-

after referred to was and is president of the Brighton Packing Co., a Massachusetts corporation duly organized and existing under the laws of the Commonwealth of Massachusetts; having an usual place of business at Boston in the District of Massachusetts. The said defendant at all times hereinafter referred to was and he is engaged at said place of business in the sale at wholesale of beef and veal carcasses and wholesale cuts thereof.

2. On or about the tenth day of December, nineteen hundred and forty-two, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169, effective the sixteenth day of December, nineteen hundred and forty-two, establishing maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof. At all times hereinafter mentioned said Revised Maximum Price Regulation No. 169 has been and is in full force and effect.

3. At all times hereinafter referred to said Revised Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942, as amended (Public Law No. 421, 77th Congress), approved January 30, 1942.

4. At all times hereinafter referred to Revised Maximum Price Regulation No. 169, Section 1364.401, provides that on or after December 16, 1942, regardless of any contract and agreement, or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cuts, and no person shall buy or receive any beef carcass or beef wholesale cuts at a price higher than the maximum price permitted by Section 1364.451, and no person shall agree, offer, solicit or attempt to do any of the foregoing.

5. At all times hereinafter referred to the sale and delivery of beef and veal carcasses and wholesale cuts thereof was a matter within the jurisdiction of the Office of Price Administration.

6. At all times hereinafter referred to the Office of Price Administration was an agency of the United States by virtue of the provisions of Section 201 of the aforesaid Emergency Price Control Act of 1942, as amended.

7. At all times hereinafter referred to the maximum prices for beef and veal carcasses and wholesale cuts thereof were determined under Section 1364.451.

8. On or about the second day of February in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, said Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Albert Bramson, of Winthrop, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Albert Bramson two forequarters of beef, of Choice Grade, one weighing 194 lbs. and one weighing 182 lbs., for a total price of \$127.84.

COUNT TWO:

And the jurors aforesaid, upon their oaths aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count 1 hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the eighteenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, of Choice Grade, weighing 282 lbs., for a total price of \$90.24.

COUNT THREE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the twenty-fifth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 367 pounds, for a total price of \$117.44.

COUNT FOUR:

And the jurors aforesaid, upon their oaths aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive of Count 1 hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the fifteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, of Commercial Grade, weighing 168 pounds, and one forequarter of beef, of Good Grade, weighing 166 pounds, a total weight of 334 pounds, for a total price of \$106.88.

A true bill.

EARL B. MUNRO,

Foreman of the Grand Jury.

WILLIAM T. MCCARTHY,

Ass't. United States Attorney for the

District of Massachusetts.

DISTRICT OF MASSACHUSETTS.

February 24, 1943.

Returned into the District Court by the grand jurors and filed.

ARTHUR M. BROWN,

Deputy Clerk.

The indictment in this cause is presented by the grand jury at the present December Term, 1942, of this court, when on February 24, 1943, the Honorable George C. Sweeney, District Judge, sitting, the defendant, Albert Yakus, is set to the bar and, the reading of the indictment being waived, says that thereof he is not guilty.

At the same term, on March 1, 1943, the defendant files the following Motion to Quash the Indictment:

DEFENDANT'S MOTION TO QUASH INDICTMENT.

[Filed March 1, 1943.]

Now comes the defendant, Albert Yakus, by his counsel, and moves the court to quash the indictment herein and each and every count thereof, upon the following grounds:

1. That the indictment and no count thereof sets forth a criminal offense against the United States of America.

2. That the indictment and no count thereof sets forth an offense against the United States of America with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.

3. That the allegations in the indictment and each and every count thereof do not set forth the essential elements of the offense with sufficient clearness, uncertainty and particularity to enable the defendant to understand the nature of the charge against him, more particularly in that

(a) The indictment in each count thereof purports to charge the defendant with a violation of Section 4 (a) of the Emergency Price Control Act of 1942 as amended, in that the defendant is alleged to have sold and delivered

wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended, the sale and delivery of which is prohibited at prices higher than those established by said Section, and

(b) The maximum price of each wholesale beef cut in each of said counts, is therefore an essential element to the commission of the offense stated and various unit prices apply to different wholesale beef cuts but are not set forth in said indictment or any count thereof and does not apprise the defendant of whether the prices charged on each wholesale cut of beef is in fact higher than those provided for by said Revised Maximum Price Regulation No. 169 as amended; and

(c) The maximum price of each of said wholesale beef cuts is determined not only under Section 1364.451 of said Revised Maximum Price Regulation No. 169, as amended, as alleged in paragraph 7 of the indictment and every count thereof, but also under Sections 1364.452, 1364.453 and 1364.454 of said Regulation.

4. In each count of the indictment herein the allegations of fact necessary to constitute a crime against the United States of America are insufficient, uncertain and ambiguous.

5. That the allegations in the indictment and each count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal, he would not be able to plead former jeopardy.

6. That the Act of Congress known as the Emergency Price Control Act of 1942 as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

7. That the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority

of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

9. That the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, pointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

10. Revised Maximum Price Regulation No. 169 as amended, is invalid in whole or in part for the reason that it was founded upon indefinite or indeterminable standards which could not be known or determined at the time of the issuance of the said Regulation and not so sufficiently established as to support an indictment for a criminal offense under any of its terms.

11. Revised Maximum Price Regulation No. 169 as amended, upon which the indictment and each and every count thereof is predicated infringes upon the power of Congress to make and enact laws of the United States.

12. Revised Maximum Price Regulation No. 169 as amended, arbitrarily, capriciously and unreasonably established such low maximum prices in the area where the defendant conducted his business as set forth at the time stated in the indictment as to invade the property rights of the defendant without due process

of law in violation of the Fifth Amendment to the Constitution of the United States.

13. Revised Maximum Price Regulation No. 169 as amended, is unjust and unreasonable and therefore invalid under the Constitution of the United States of America and more particularly under Article I, Section 1 thereof, and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcasses and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

14. That the Regulation upon which the indictment and each count thereof is predicated, is dependent upon determinations of fact, which determinations are not shown as required by law.

15. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported consideration representing the opinion of the price administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942 as amended.

16. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported considerations representing the opinion of the price administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

17. That Revised Maximum Price Regulation No. 169 as amended, is invalid because it was issued without prior approval of the Secretary of Agriculture in violation of Section 3 (e) of the Emergency Price Control Act of 1942.

18. That Revised Maximum Price Regulation No. 169 as amended, is invalid because the maximum prices fixed thereby for beef and veal carcasses and wholesale cuts thereof in this District are so unreasonable as to constitute a taking of private property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States of America.

19. Where it does not appear from any Act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each count therein that he has given consideration as required by the amendment to the Emergency Price Control Acts, Acts of Congress, October 2, 1942, to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing then Section 1364.451 is invalid in whole or in part by reason of the failure of the price administrator to so consider.

20. The terms of the Revised Maximum Price Regulation No. 169 as amended, are too vague, indefinite and uncertain

(a) to guide the defendant with reasonable certainty in determining what conduct is permissible and what conduct is punishable so as to enable him to prepare and make his defense, thus depriving him of his property in violation of the Fifth Amendment to the Constitution of the United States of America;

(b) to satisfy the requirement of the Sixth Amendment to the Constitution of the United States of America by apprising the defendant with reasonable certainty of the conduct which will render him liable to punishment for the commission of the offences with which he is charged; and

(c) to enable the defendant to plead an acquittal or conviction to the offenses with which he is charged in the indictment herein in bar to a further prosecution against him based upon the same matters or things or any of them on which the indictment is laid.

21. That the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is void, because of unconstitutional delegation of legislative power.

22. The Emergency Price Control Act of 1942 is invalid because it purports to exercise the police power which is reserved to the states respectively or to the people under the provisions of the Tenth Amendment to the Constitution.

23. That count 1 of said indictment alleges that the defendant sold and delivered "rumps and rounds" at prices higher than set forth by the maximum price determined under Section 1364.451 of Revised Maximum-Price Regulation No. 169 as amended, but no such wholesale cut as "rumps and rounds" for which a price can be determined is set forth in said Regulation.

By his Attorneys,

JOHN H. BACKUS,
LEONARD PORETSKY.

On the same day the foregoing motion comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and upon consideration thereof is denied. The defendant thereupon requests leave to file an amendment to his motion to quash, which leave the court grants, but it is ordered that the motion to quash when so amended be denied.

At the same term on March 3, 1943, the defendant files the following Motion to Amend his Motion to Quash:

DEFENDANT'S MOTION TO AMEND HIS MOTION TO QUASH.

[Filed March 3, 1943.]

Now comes the above-named defendant and moves to amend motion to quash by adding thereto the following:

Section 2 (a) Emergency Price Control Act Public Law 421—77th Congress requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provisions of this sub-section (Section 2 (a)) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order".

And it appearing as a requirement of law that such regulation, order or consideration shall be filed with the Division of the Federal Register and it further appearing from the provisions of Revised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said Regulation were filed with the Division of the Federal Register and by the provisions of the Act of Congress October 2, 1942, it is required that Section 3 (2) "in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing"; provided further, "that in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity as provided in this Act adequate weighting shall be given to farm labor".

And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

1st—a generally fair and equitable margin for processing an agricultural commodity including livestock; and

2nd—adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in

whole or in part to so consider and this defendant should not be called upon to plead further and this indictment should be quashed.

By his Attorneys,

JOHN H. BACKUS,
LEONARD PORETSKY.

At the same term on April 6, 1943, it is ordered by the court, the Honorable Arthur D. Healey, District Judge, sitting, that this indictment and indictments No. 16077 and No. 16079 be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Arthur D. Healey, District Judge, sitting, and the jury is duly empanelled and sworn, videlicet: Wilbur L. Longden, Foreman, Francis O. Conant, Edward Andrews, Chester E. Bigelow, Arthur E. Gaskin, Sr., James J. Sullivan, Harry E. Bryant, Richard T. Morey, Lebaron A. Clarridge, Alexander H. Kingston, Winfield S. Hanson, James W. Stiles.

This cause, together with causes numbered 16077 and 16079 comes on for trial on the pleadings and evidence on April 6 and 7, 1943.

On April 7, 1943, count one of the indictment is nol prossed by Joseph G. Gottlieb, Esq., Assistant, United States Attorney, and thereupon the remaining counts, 2, 3, and 4 are committed to the jury who, after considering all matters and things concerning the same, return their verdict therein and upon oath say that thereof the defendant is guilty on counts 2, 3, and 4 of the indictment.

Said cause is thence continued for sentence to April 30, 1943, when the following Judgment is entered:

JUDGMENT AND COMMITMENT.

April 30, 1943.

On this thirtieth day of April, 1943, came the United States Attorney, and the defendant Albert Yakus appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the second, third, and fourth counts of the indictment in the above-entitled cause, to wit, Violation of Emergency Price Control Act of 1942, as amended (Public Law No. 421, 77th Congress), Approved Jan. 30, 1942; Revised Maximum Price Regulation No. 169 it is by the court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the type to be designated by the Attorney General or his authorized representative for the period of six months and to pay a fine of one thousand dollars (\$1000.); and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further ordered that the clerk deliver a certified copy of this judgment and commitment to the United States marshal or other qualified officer and that the same shall serve as the commitment herein.

ARTHUR D. HEALEY, *Judge.*

MEMORANDUM April 30, 1943: Sentence and judgment stayed pending appeal.

On the same day the defendant files the following Motion in Arrest of Judgment:

MOTION IN ARREST OF JUDGMENT.

[Filed April 30, 1943.]

Now comes the defendant in the above-captioned cause, and moves that the verdict returned against him by the jury on the seventh day of April, 1943, be set aside, revoked, stopped and stayed, as if no verdict had been returned against him, for the following reasons:

1. The Emergency Price Control Act of 1942, Section 204 (d) is unconstitutional and void in that it provides as follows:

"Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

Which provision violates the Sixth Amendment to the Constitution of the United States of America by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

2. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169, as amended, is unreasonable, arbitrary and capricious.

3. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America by depriving him in a criminal action of the defense that Revised Maximum Price Regulation No. 169, as amended, is contrary to and not in conformity with the provisions of Section 3 of P. L. 729, 77th Congress, 2nd Session, also known as the McKellar Amendment to the Emergency Price Control Act of 1942.

4. Revised Maximum Price Regulation No. 169, as amended, is unconstitutional and void, for the reason that it violates the provisions of Section 3 of the McKellar Amendment (P. L. 729, 77th Congress, 2nd Session):

"That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including

“livestock, a generally fair and equitable margin shall be allowed for such processing”

and fails to allow any margin for processing livestock into dressed beef carcasses and wholesale cuts.

5. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America by denying him in a criminal action of the defense that the statement of considerations accompanying Revised Maximum Price Regulation No. 169, as amended, involved in the issuance thereof, does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

6. Revised Maximum Price Regulation No. 169, as amended, is invalid and void for the reason that the accompanying statement of considerations involved in the issuance thereof does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

7. Revised Maximum Price Regulation No. 169 as amended, is a mathematical problem of variable content in that Section 1364.451 (b) requires the defendant to determine and fix the maximum ceiling price in accordance with the provisions of paragraph (a) of Section 1364.451 and specified in Section 1364.452 minus the required deductions specified in Section 1364.453 plus permitted additions set forth in Section 1364.454.

8. Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is in violation of the rights of the defendant under the Fifth and Sixth Amendments to the Constitution of the United States of America in that it requires the defendant to define and fix the crime with which he is charged.

By his Attorney,

LEONARD PORETSKY.

On the same day the foregoing motion in arrest of judgment comes on for hearing before the court, the Honorable Arthur D.

Healey, District Judge, sitting, and after consideration thereof, is denied.

On the same day the defendant files a motion for stay of execution of sentence pending appeal which is allowed by the court and the defendant's bail is continued.

From the foregoing judgment the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

On May 24, 1943, the defendant files a bill of exceptions which on the same day is duly allowed by the Honorable Arthur D. Healey, District Judge.

On June 2, 1943, the Honorable Arthur D. Healey, District Judge, upon motion of the defendant extends the time for filing and allowance of the defendant's bill of exceptions to June 2, 1943.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed May 24, 1943.]

This is an indictment brought under the Emergency Price Control Act of 1942, as amended, wherein the defendant is charged with violating Section 4 (a) of the same Act and Section 1364.401 of Revised Maximum Price Regulation No. 169, as amended, hereinafter called the "Regulation", by wilfully, knowingly and unlawfully selling and delivering wholesale cuts of beef at prices in excess of the maximum prices permitted under Section 1364.451 of said Regulation;

COUNT II charging that on or about December 18, 1942, the defendant did sell and deliver to Meyer Kramer 2 forequarters of beef, choice grade, weighing 282 pounds for a total price of \$90.24;

COUNT III charging that, on or about December 25, 1942, the defendant did sell and deliver to Meyer Kramer 2 forequarters of beef of unknown grade, weighing 367 pounds, for a total price of \$117.44;

COUNT IV charging that, on or about January 15, 1943, the defendant did sell and deliver to Meyer Kramer 2 forequarters

of beef of commercial grade, weighing 168 pounds, and 1 fore-quarter of beef of good grade, weighing 166 pounds, the total weight being 334 pounds, for a total price of \$106.88.

The defendant, Albert Yakus, was president of the Brighton Packing Company, duly incorporated under the laws of Massachusetts on April 14, 1942, and the defendant owned twenty-five per cent of the capital stock. The regulations in question appear in 7 Federal Register, beginning on page 10381 and 10709—8 Federal Register 164 and 491, which were marked as Government Exhibit 2 and offered for the purposes stated in Section 307 of Title 44 of the U.S.C.A.

The defendant seasonably filed a motion to quash the indictment as a whole and to each count thereof. The motion came on for hearing on March 23, 1943, and was denied after argument. By leave of court, the defendant was permitted to file an amendment to his motion to quash, which was also denied. The defendant being aggrieved by the court's denial of the defendant's motion to quash and defendant's motion to amend, duly claimed exceptions. Thereafter, the defendant, having pleaded "Not Guilty", was set to trial before Healey, J., and a jury on the sixth day of April, 1942, with two other cases wherein Brighton Packing Company and Joseph Keller were the named defendants.

The indictment and all pleadings and motions are made a part of this bill of exceptions and may be referred to.

There was evidence from which the jury could have found that one Kramer purchased each of the items for a sum in excess of the price established by the regulation as the maximum.

At the conclusion of the government's case, the following took place:

Mr. Garland. The defendant's offer of proof, which applies in all of these cases, and it may be considered that all of the defendants are offering this offer of proof. Right at this point I will let you insert this offer of proof.

United States District Court for the District of Massachusetts
Criminal No. 16,071

United States of America

v.s.

Brighton Packing Company

DEFENDANT'S OFFER OF PROOF

The defendant offers to prove through the testimony of Prentiss M. Brown, Price Administrator, that the Maximum Price Regulation No. 169, as amended December 10, 1942, effective December 16, 1942, Sections 1364.451 to 1364.455 inclusive, setting forth the maximum prices for beef processed from livestock, does not provide an equitable margin for the processing of beef in accordance with the Emergency Price Control Act of 1942, as amended October 2, 1942 (McKellar Amendment).

The government does not object to this evidence on the ground of competency, but does object to it as irrelevant, by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d) of which provides in part as follows:

"Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The court excluded the foregoing evidence and offer of proof as irrelevant by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d), subject to the defendant's exception.

The Court: Do you want to make objection?

Mr. McCarthy: Yes, I do, your Honor. The government objects to this for two reasons; first because this is a matter which cannot properly be raised in these proceedings, secondly we ob-

ject to the form of the defendant's offer of proof because it has contained in it these words, "The government does not object to this evidence on the ground of competency, but does object to it as irrelevant." We do object to it on the ground of competency.

The Court. You do object?

Mr. McCarthy. Yes, because, your Honor, upon the assumption that Mr. Brown—we would object to the admissibility of this testimony on the ground that he was not qualified in the light of his previous background to set himself up as an expert.

The Court. Perhaps you had better leave that out.

Mr. Thompson. I want it in the record.

Mr. McCarthy. I am not opposed to it; I mean it seriously. We do not consider this competent. I don't agree it is competent.

The Court. Can we sum it up this way, that you object to this evidence on the ground of competency; you do object on the ground of competency and also that it is irrelevant by reason of the provisions of the Emergency Price Control Act of 1942 as amended by Section 204 (d)?

Mr. McCarthy. Right.

The Court. I am going to exclude the testimony, the evidence in the offer of proof as irrelevant by reason of Section 204 (d) of the Emergency Price Control Act of 1942 as amended, and will save the defendant's exceptions.

Thereupon, the defendant Albert Yakus offered to prove, by the testimony of SYDNEY H. RABINOVITZ, that compliance by the defendant with Revised Maximum Price Regulation No. 169, as amended, would require the defendant, in the efficient conduct of his business, to sell his product at a price lower than the actual cost of production. The offer of this testimony was submitted in writing, a copy of which is as follows:

Said Rabinovitz would testify that he is president of the Colonial Provision Company, a corporation organized under the laws of Massachusetts in 1917, with a place of business in Boston, Massachusetts; that he is president and treasurer of Girard Packing Company, a Pennsylvania corporation with a usual place of

business in Philadelphia, Pennsylvania; that he is a director of the New England Wholesale Meat Dealers' Association, an organization composed of wholesale meat dealers in New England; that he is a member of the executive committee of said association, and has served on committees taking up the problems of the meat industry at Washington, D. C.; that he has been engaged in the wholesale meat business for thirty-six years, and during that time has bought and sold beef carcasses and wholesale cuts thereof, has slaughtered beef, and has processed beef and pork; that the Colonial Provision Company, the Boston concern with which he is connected, does a business of approximately \$8,000,000 a year; that he is familiar with slaughtering, with the cattle yield of dressed beef in Boston, and with the cost of dressed beef to the trade in Boston; that he is also familiar with the methods employed in purchasing, processing, and marketing livestock; that he follows all market quotations on livestock and dressed beef daily, and has done so for a good many years prior to this date, and is familiar with livestock markets and the publication of market prices issued by the United States Department of Agriculture, and trade and newspaper reports; that he is familiar with the grades and classes of livestock used in the Boston market and slaughtered locally, and the market prices of livestock to the slaughterer.

Said Rabinovitz would also testify that for the period from December 10, 1942, to early February, 1943, the average market prices to the slaughterer, based on the average market price of livestock purchased in Chicago, Illinois, of the type which would produce the grade of meat specified, were as follows:

<u>Grade</u>	<u>Livestock Weight at Chicago</u>	<u>Av. Price per. cwt.</u>	<u>Av. Total Price at Chicago</u>	<u>Expenses commission, insurance taxes & feeding) at 15¢ per cwt.</u>	<u>Livestock wt. at Boston (5% Shrinkage)</u>	<u>Freight based on wt. at Boston 56¢ per cwt.</u>
AA Choice Steer	1200	\$16.70	\$200.40	\$1.80	1140	\$6.38
AA Choice Heifer	900	\$15.75	\$141.75	\$1.35	855	\$4.79
A Good Steer	1200	\$15.50	\$186.00	\$1.80	1140	\$6.38
A Good Heifer	900	\$14.75	\$132.75	\$1.35	855	\$4.79
B Commercial Steer	1200	\$13.50	\$162.50	\$1.80	1140	\$6.38
B Commercial Heifer	900	\$12.63	\$113.67	\$1.35	855	\$4.79
B Commercial Cows	1000	\$12.50	\$125.00	\$1.50	950	\$5.32
C Utility Cows	900	\$11.15	\$100.35	\$1.35	855	\$4.79
Cutters & Cannors	800	\$ 9.58	\$ 76.64	\$1.20	760	\$4.26

Freight based on wt. at Boston 56¢ per cwt.	Expenses at Boston (yarding, slaughtering, dressing, overhead - exclusive of capital investment of slaughterer) \$1.00 per cwt.	Credits-based on wt. at Chicago			Dressed yield based on wt. at Chicago	Average cost-dressed per cwt.		
		Average Gross cost at Boston	Hides-\$1 per cwt. Offal-.70 " " Tallow, fat & bones-.30 per cwt. Total \$2. per cwt.	Average Net Cost at Boston		Carcass	Hind	Fore
\$6.38	\$11.40	\$219.98	\$24.00	\$195.98	59% - 708 lbs.	\$27.70	\$30.95	\$24.75
\$4.79	\$ 8.55	\$156.44	\$18.00	\$138.44	57% - 513 "	\$26.99	\$30.25	\$24.00
\$6.38	\$11.40	\$205.58	\$24.00	\$181.58	57% - 684 "	\$26.52	\$29.25	\$24.00
\$4.79	\$ 8.55	\$147.44	\$18.00	\$129.44	55% - 495 "	\$26.15	\$28.90	\$23.65
\$6.38	\$11.40	\$181.58	\$24.00	\$157.58	55% - 660 "	\$23.88	\$26.13	\$21.88
\$4.79	\$ 8.55	\$128.36	\$18.00	\$110.36	53% - 477 "	\$23.14	\$25.39	\$21.14
\$5.32	\$ 9.50	\$141.32	\$20.00	\$121.32	54% - 513 "	\$23.65	\$25.90	\$21.65
\$4.79	\$ 8.55	\$115.04	\$18.00	\$ 97.04	51% - 459 "	\$21.15	\$22.90	\$19.65
\$4.26	\$ 7.60	\$ 89.70	\$16.00	\$ 73.70	44% - 352 "	\$20.94	\$20.94	\$20.94



Said Rabinovitz would also testify that the foregoing schedule represents the method of computation generally followed by the trade, showing average costs and expenses, the yield returned as the result of the slaughter of the various classes of livestock, the cost of dressed beef and wholesale cuts known as fores and hinds, based upon the trade experiences and methods employed for many years by an efficiently conducted business; that the cost of production is further increased by shrinkage between the time of slaughter and delivery to the customer.

The court excluded the foregoing evidence and offer of proof as irrelevant and immaterial by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d), subject to the defendant's exception, in which the court stated:

The Court. I am excluding it because of its immateriality, and it is immaterial, in my judgment, because of the verbiage of this statute. The stenographer will note I have excluded the testimony which their offer of proof makes on the ground that the testimony is immaterial by reason of the language of the statute which is contained in the Emergency Price Control Act of 1942, as amended, Section 204 (d), which is as follows:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 (Section 902 of this Appendix), of any price schedule effective in accordance with the provisions of Section 206 (Section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule,

or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision. January 30, 1942, c. 26, Title II, section 204, 56 Stat. 31."

Thereupon the defendant rested, and the foregoing is all of the evidence which is material to the issues on this appeal.

Thereafter, the defendant seasonably filed the following requests for instructions to the jury, which instructions were denied, and the defendant's exceptions thereto were duly noted:

14. If the maximum prices established by Revised Maximum Price Regulation as amended, and set forth in Section 1364.451 were so low that it was impossible for the defendant in the efficient conduct of his business to comply with said regulation without incurring loss then said regulation and the maximum prices established thereby were unreasonable, arbitrary and capricious as to this defendant and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States of America and invalid and of no effect.
15. If the maximum prices for wholesale cuts of beef established by Revised Maximum Price Regulation No. 169 Section 1364.451 are less than the cost of production in the efficient conduct of the defendant's business, said regulation and the maximum prices established thereunder are unreasonable, arbitrary and capricious as to this defendant and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States of America and invalid and of no effect.
16. The Emergency Price Control Act of 1942 as amended, is unconstitutional and void if contrary to the provisions of the Constitution of the United States of America and more particularly Article I, Section 1 thereof, said Act purports to authorize the price administrator to pass a prohibitory law, penal in nature.

17. The Emergency Price Control Act of 1942 as amended, is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169 as amended is unreasonable, arbitrary and capricious.
18. The Emergency Price Control Act of 1942 is unconstitutional and void particularly Section 204 (d) if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show in his defense of a criminal action that the statement of considerations accompanying Revised Maximum Price Regulation No. 169 as amended, involved in the issuance thereof does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.
19. The Emergency Price Control Act of 1942 is unconstitutional and void particularly Section 204 (d) if it deprives the defendant of his right under the Sixth Amendment to the Constitution of the United States of America to show in his defense of a criminal action that the statement of considerations accompanying Revised Maximum Price Regulation No. 169 as amended, involved in the issuance thereof does not show compliance with the provisions of Section 2. (a) of Title I of the Emergency Price Control Act of 1942.
20. The provisions of the Emergency Price Control Act of 1942, particularly Section 204 (d) is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment of the Constitution of the United States of America to show in his defense of a criminal action that Revised Maximum Price Regulation No. 169 is contrary to and not in conformity with the provisions of Section 3 of the McKellar Amendment, so-called, to the Emergency Price Control Act of 1942 (P.L. 729, 77th Congress, Second Session).

21. The provision of the Emergency Price Control Act of 1942, particularly Section 204 (d) is unconstitutional and void if it deprives the defendant of his right under the Sixth Amendment of the Constitution of the United States of America to show in his defense of a criminal action that Revised Maximum Price Regulation No. 169 is contrary to and not in conformity with the provisions of Section 3 of the McKellar Amendment so-called, to the Emergency Price Control Act of 1942 (P.L. 729, 77th Congress, Second Session).
22. If the accompanying statement of considerations involved in the issuance of Revised Maximum Price Regulation No. 169 as amended does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942, said regulation is invalid and void.
23. The Emergency Price Control Act of 1942 is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169 as amended is unreasonable, arbitrary and capricious.
24. The Emergency Price Control Act of 1942 is unconstitutional and void for the reason that, contrary to the provisions of the Constitution of the United States of America, and more particularly of Article I, Section 1 thereof, by specific reference to enumerated subjects set out in Section 1 of said Act, Congress seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.
25. The Emergency Price Control Act of 1942, as amended, insofar as it confers authority upon the price administrator, provided for in Section 2(a) of Title I of said Act, to establish

such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act, is invalid as an unconstitutional delegation of the legislative power, which, under the provisions of Article I, Section 1 of the Constitution of the United States of America is vested exclusively in the Congress.

27. The Emergency Price Control Act of 1942, as amended, insofar as it confers authority upon the price administrator, under Section 2 of Title I of said Act, to establish regulations or orders in such form and manner, containing such classifications and differentiations, providing for such adjustments and exceptions as in the judgment of the administrator are necessary or proper in order to effectuate the purposes of this Act, is invalid as an unconstitutional delegation of the legislative power, which, under the provisions of Article I, Section 1 of the Constitution of the United States of America is vested exclusively in the Congress.
28. The Emergency Price Control Act of 1942, as amended, insofar as it purports to confer authority upon the price administrator, provided for in Section 2 (a) of Title I of said Act, to establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.
29. If the jury finds that the wholesale beef cuts referred to in the indictment could only be used within the confines of the boundaries of Massachusetts, then the Emergency Price Control Act of 1942 as amended insofar as it applies to this defendant is unconstitutional and void for the reason that it purports to exercise the police power which is reserved to the states respectively or to the people under the Tenth Amendment to the Constitution of the United States of America.

30. If Revised Maximum Price Regulation No. 169 fails to conform to the standards and mandates set therefor by and contained in the provisions of the Emergency Price Control Act of 1942 as amended said regulation is invalid and void.
31. If it does not appear from the statement of considerations filed with the Federal Register by the price administrator that in fixing the maximum price or prices thereunder that he has given consideration to the matters established under Section 2 (a) of the Emergency Price Control Act of 1942 and the relation between the price or prices of livestock and the products resulting from the processing thereof so as to provide a generally fair and equitable margin for such processing as required by Section 3 of the McKellar Amendment (P. L. 729, 77th Congress, Second Session), Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended and relied upon in this indictment is invalid in whole or in part.
32. If Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended requires the defendant to define and fix the crime with which he is charged then said regulation is unconstitutional and void in that it is a violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States of America.
33. If Revised Maximum Price Regulation No. 169 as amended compels the defendant in the efficient conduct of his business to sell wholesale cuts of beef below the actual cost of producing such cuts said Regulation is unreasonable, arbitrary and capricious.
34. If Revised Maximum Price Regulation No. 169 as amended fails to comply with the requirements of the Emergency Price Control Act of 1942 as amended, said Regulation and the maximum prices established thereunder are invalid and of no effect.

On the seventh day of April, 1943, the jury returned a verdict

of "Guilty" on counts 2, 3 and 4 of the indictment, and thereafter on the thirtieth day of April, 1943, the defendant seasonably made a motion in arrest of judgment, which was denied, and exception thereto was duly claimed by the defendant. On the same day, the defendant was sentenced to imprisonment for a term of six months, and to pay a fine of \$1,000, which sentence, on motion of the defendant, was stayed. Thereafter, on the fourth day of May, 1943, notice of appeal was filed by the defendant.

The defendant, being aggrieved by the overruling of the defendant's motion to quash the indictment as a whole and to each count thereof, the denial of his amended motion to quash the indictment, by the exclusion of his offers of proof, by the rulings and refusals to rule as requested, by the denial of his motion in arrest of judgment, now presents this, his bill of exceptions, and prays that the same may be allowed.

ALBERT YAKUS,

by his Attorneys,

HUBERT C. THOMPSON,
LEONARD PORETSKY.

The court then charged the jury as follows:

Mr. Foreman and Gentlemen, the indictments on which these cases were founded originally presented forty-three counts against the Brighton Packing Company. That is the corporate defendant, and I shall hereafter refer to the Brighton Packing Company as the corporate defendant in these cases. There were presented thirty-nine counts against the defendant Keller and four counts against the defendant Yakus. Now the government, through its prosecuting officer, through devices of law known as *nolle prosequi* has elected to present only certain counts in all of these cases against all of these defendants, and has offered no evidence for your consideration on the balance of the counts which have been not prossed. Now, whether the government has elected to do this for the purpose of shortening the case, expediting it, or

whatever reason it may have had, they are not presenting evidence on these particular counts, and that is not for your consideration. You are to confine your deliberation to the other charges on the evidence that has been offered by the government in support of those other charges.

Now there remains certain counts which are numbered in the indictment—I will speak of those later, the number of counts that you are to consider, and I am going to ask the clerk to give you a record of the counts which have been eliminated, and the remaining ones that you are to consider in each of these cases against the defendants.

Now, you must consider each defendant's case separately, and you ought to consider each count and each separate indictment separately. Each count is based on a transaction, and you should thoroughly analyze and weigh the evidence supporting each separate count of each separate indictment. Those indictments charge the corporate defendant and each of the individual defendants, Keller and Yakus with having wilfully violated Section 49 of the Emergency Price Control Act of 1942, as amended, by having sold and delivered different cuts of beef at prices exceeding the ceiling prices fixed by the Revised Maximum Price Regulation 169, which became effective December 16, 1942. The latter regulation was issued by the administrator of the Office of Price Administration pursuant to the authority granted under the Emergency Price Control Act of 1942. In other words, Congress enacted this Act known as the Emergency Price Control Act of 1942, and delegated to an agency known as the Office of Price Administration the duties of fixing these ceiling prices. Obviously a large body, consisting of the Senate and House of Representatives, ninety-six members of the Senate and four hundred and thirty-five members of the House of Representatives could not possibly be expected to make ceilings on prices and to carry out the many other details that are necessary under this Act, and so Congress delegated these duties to this agency known as the Office of Price Administration.

Now, certain price ceilings were fixed on beef carcasses and wholesale cuts of beef, and they became effective—they were fixed by the administrator of the Office of Price Administration, and they became effective on December 16, 1942, and fixed or established the maximum price for the sale of beef and wholesale cuts thereof.

At all times referred to in these indictments the ceiling prices fixed by the Revised Maximum Price Regulations were in full force and effect, that is, during all the time mentioned in these indictments, and at all times when the transactions mentioned in these indictments occurred those ceiling prices remained in force and effect.

Now, the Revised Maximum Price Regulation No. 169, Section 1364.401 provides that on and after December 16, 1942, regardless of any contract or agreement or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451. Let me say that that section prescribed a certain formula by which the persons engaged in this trade were enabled to arrive at the ceiling price, and no person shall either slaughter or attempt to do any of the foregoing. The Office of Price Administration is an agency of the United States government, established by Section 201 of the Emergency Price Control Act of 1942.

Now, the validity or the constitutionality of the Emergency Price Control Act, the Act itself, or the general Maximum Price Regulation 169, which happens to be the violation that is charged here, or any of the regulations that are established pursuant to the authority conferred by that Act, are not for your consideration. It is not your concern to decide whether or not these regulations are valid, whether the law itself is valid or constitutional. That is for the court to decide. It is for you to consider, and to determine whether these defendants have wilfully violated the Emergency Control Act of 1942, as amended, by selling and delivering wholesale cuts of beef to persons at prices higher than the maximum prices determined by the regulations, as charged in the various

indictments by the government. In other words, you will determine by the evidence whether the corporate defendant and the defendant Keller and the defendant Yakus wilfully sold and delivered, at various times, wholesale cuts of beef, as charged in the indictments, to various persons at prices exceeding the ceiling prices.

Now, I have a chart here which represents the ceiling prices prevailing at the time when these transactions are charged to have taken place, and this ceiling price is fixed by the hundredweight, —by removing the decimal point over two points you will have it by the pound, the price for a pound. It is agreed by all parties here that these two represent the ceiling prices at the time of these transactions without taking into consideration the sets. You have evidence about the sets. Counsel have agreed that if the sets were included with these cuts, these forequarters, that the prices, additional prices would be three cents a pound.

When you take into consideration the ceiling price as established according to this schedule you will further take into consideration that they do not include these sets.

Now, the defendants' counsel, and they are all very skilful counsel who have established excellent reputations at this bar, have not cross-examined the witnesses, and they have elected not to put on a defense to these charges, and that is within their rights not to do that. Nor have the defendants taken the stand, and let me caution you with reference to the latter matter, the fact that the defendants did not take the stand. That does not warrant you in drawing any inference of guilt because of their failure to take the stand; that is a right which they have, and you are not to hold that against them by drawing any inference of guilt merely because they didn't take the witness stand. And even though no defense has been offered here the defendants have all entered pleas of not guilty, and that challenges the government on the facts as well as the law, the fact that they have entered pleas of not guilty. Now, of course, a presumption of innocence attaches itself to all of these defendants. In our jurisprudence a man is

presumed to be innocent until proven guilty, and the government has the burden of proving beyond a reasonable doubt the guilt of these defendants on each and every count in these indictments.

Now, reasonable doubt. A reasonable doubt is not a doubt which is founded on any frivolous matter; it is a doubt that is founded on reason and on logic, and because you are a new jury I am going to read you a definition that was used by the court in a case in one of our federal courts:

"If the evidence produced be of such a character that it produces in your mind a certainty upon which you would unhesitatingly be governed in your weighing the important concerns of life then you may be said to have no reasonable doubt concerning the guilt or innocence of the accused."

Now you cannot convict these defendants on any counts contained in these indictments unless you are convinced on all of the evidence, beyond a reasonable doubt, that the defendants are guilty of the violations charged in that count.

Now, gentlemen, these defendants are charged with wilfully violating the provisions of a section of the Emergency Price Control Act by exceeding prices fixed by the Maximum Price Regulations. Let us first consider the case of the corporate defendant. When does a corporation wilfully violate a statute? A corporation is inanimate; it is a theoretical entity. A corporation must necessarily act through individuals. The question for you to determine is did the individuals, acting for the corporation, act wilfully? If you find that they did act wilfully then their acts will be imputed or charged to the corporation.

Now, what does wilfully mean, as charged in criminal statutes? Wilfully means knowingly, and implies on the part of the actor knowledge of the purpose to do wrong. You must find on the evidence that those who acted for the corporation acted with knowledge of the regulations. With knowledge of the regulations a corporation may be found to have wilfully

violated the statute if one of its agents or officers, acting for it, acted wilfully. In this case if you find that the defendant Keller as an officer and stockholder of the corporation, acted for the corporation in making sales of meat above the ceiling prices, and that he acted wilfully in violation of the regulations it follows that the corporation wilfully violated the regulation; if you find the defendant Yakus, acting for the corporation in the performance of such acts he wilfully violated the regulation and then you can impute it as acts of the corporation and find it violated the statute wilfully.

Now you must consider the evidence as it affects the individual defendant; you must determine whether the defendant Joseph Keller wilfully violated the statute as charged in the indictment. Keller, according to the evidence, was president of the Brighton Packing Company and a large stockholder of the corporation. The fact, however, that a man is an office holder, director, or stockholder of a corporation which has committed a crime, if you find the corporation has committed a crime, does not necessarily mean that he himself has committed a crime. Officers will not be liable for acts of which they have no knowledge, at least, where the crime requires a clear knowledge or a criminal intent. The question for you to determine is whether he had knowledge of the wilful violation of the statute by the corporation, or whether as an officer he had the duty and the power to supervise that particular conduct and did nothing to correct that conduct, or whether he used the corporation purposely to wilfully violate the statute. If you find on the evidence he possessed the knowledge of a wilful violation by the corporation and either acquiesced or that he himself was the actual person who took cover behind the corporation then you could find him guilty of wilfully violating the statute as an individual. In other words, it is not sufficient merely to find that he was an officer or stockholder of a corporation which was wilfully violating the statute; you must find that he had knowledge of the violation and did nothing to prevent such violation, or that he purposely used the corporation as

an instrument for the accomplishment of the wilful violation of this statute.

What I have said concerning the defendant Keller, of course, applies to the defendant Yakus. Yakus, according to the evidence, is the treasurer and a stockholder of the corporation defendant. If you find on all the evidence that the defendant Yakus used the corporation as a means of wilfully violating the statute you may find him guilty as charged in the indictment of wilfully violating the statute. Or, if you find that he knew about that wrong and knew about the wilful violation by the corporation and had the duty and power to supervise that particular conduct and did nothing to correct the matter then you could find him guilty as charged in the indictment. Now I want to say to you that if on the evidence you are convinced that the defendant Yakus did nothing other than to weigh and deliver these cuts of meat, that he didn't participate in any attempt, or actually participated in the act of violation of this statute then the government has not made out its case against Yakus. You must find that he had the knowledge of what was going on or that he actually himself used the corporation to perpetrate the violation against this statute.

Now, as I have stated before, you must take each and every separate count of every indictment. And, perhaps at this juncture I ought to say to you that the counts which still remain in the indictment against the corporate defendant, which you are to consider, are as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. Will you make a note, Mr. Clerk, right away?

The Clerk. Yes, your Honor.

The Court. 1 to 12, inclusive still remain in the indictment against the corporation which you gentlemen are to consider; then you will consider 14, 15 and 16 of that indictment, and counts 29, 31, 35, 38, 39, 40, 41, and 42. In other words there are twenty-three counts remaining for your consideration against the defendant corporation, and you are to consider each and every separate count in the indictment. I want to say to you that

the counts, remaining counts which have been disposed of by the *nolle prosequi* are not to be considered at all by you, and you are not to be concerned about them or the motive for taking the action which the United States Attorney has resorted to.

Now, in the Keller indictment there still remains for your consideration counts 1 to 11 inclusive, 13 to 15 inclusive and 34 to 39 inclusive. In all that is twenty counts against the defendant Keller. The other counts contained in this indictment, and you will have these indictments in the jury room, have been disposed of by the same method that I referred to.

In the indictment against Yakus, which originally contained four counts, count 1 has been not prossed, and there remains counts 2, 3 and 4 for your consideration.

You have heard the evidence of the various witnesses produced here by the government; you have heard their evidence as to these transactions that were given to you, with the corporate defendant and with its officers, the defendants Yakus and Keller. You will have in the jury room, as I stated, the indictments; you will have all the exhibits that have been produced by the government. Of course, you are not required to believe any of the witnesses. Their credibility is entirely for you to determine. Or, you may believe any or all of them and disbelieve any or all of them, or you may believe and accept any part of their testimony or reject any part of their testimony.

Now, at this time I want, for the purposes of the record, to refer to the schedules of prices, ceiling prices that obtained at the time it is alleged these transactions took place. I am going to ask that the stenographer embody in the record this schedule, and it is my purpose that the jury may have this schedule with them to aid them in determining the issues presented by this case.

Now, gentlemen, I don't think it is necessary for me to dwell very long on the fact of the type of consideration you ought to give this case. Serious violations are charged here, criminal violations on the part of these defendants. You have a duty to perform as citizens of this country. You must consider these

matters in a calm, deliberate manner, free from passion or prejudice, free from public clamor, in the light of the facts that have been developed only; you must permit no outside influence or anything that is extrinsic to influence your considered judgment.

Now, if counsel care to confer with me, or have anything they may suggest.

[Counsel confer with court at bench.]

Mr. Thompson. We want to note our exception to your refusal to include those things which you have already disregarded when we were outside, so that our failure to object specifically to each one does not indicate our waiver of those.

Mr. McCarthy: Are there any of those requests which his Honor said he would give that you are not satisfied with?

Mr. Thompson. No, he has covered them all right.

Mr. Garland. It is understood that the defendants do not waive any of the rights they have saved during the trial by their failure to take exceptions to any part of the charge.

Mr. Poretsky. These remarks by Mr. Thompson and Mr. Garland also cover Yakus.

The Court. Gentlemen, my attention has been called by one of the United States attorneys that Yakus is the president and Keller is the treasurer. I think I stated it the other way but, after all, you are the judge of the evidence, but I feel I should make that correction to you.

One of defendants' counsel has requested me to give you certain requests. I have agreed to do that, and I am going to read them to you verbatim, and give them to you verbatim.

"The jury should not rest its verdict upon conjecture or suspicion alone and if you find that all the evidence offered by the government merely creates a suspicion that the defendant may have committed the offense alleged, with respect to each such count, you must find him not guilty."

"Where all the evidence is as consistent with innocence as with guilt, then it is the duty of the jury to return a verdict of not guilty."

NOTICE OF APPEAL.

[Filed May 4, 1943.]

Name and Address of Defendant-appellant:

Albert Yakus, 36 Litchfield Street, Brighton, Mass.

Name and Address of Defendant-appellant's Attorney:

Leonard Poretsky, Esquire, 6 Beacon Street, Boston, Mass.

Offense:

Wilfully, unlawfully and knowingly violating Section (4A) of the Emergency Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of Judgment:

April 30, 1943.

Brief Description of Judgment or Sentence:

The defendant-appellant was sentenced to confinement for six months in such institution as the Attorney-General of the United States shall designate, and to pay a fine of (\$1,000) one thousand dollars.

Upon application by defendant-appellant, defendant-appellant was admitted to bail pending his appeal to the United States Circuit Court of Appeals for the First Circuit, from the judgment of conviction herein.

I, the above named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the First Circuit from the judgment above-mentioned on the ground set forth below.

Dated at Boston, Massachusetts, this fourth day of May, 1943.

ALBERT YAKUS,

by LEONARD PORETSKY,

Attorney for Defendant-Appellant.

GROUND OF APPEAL. The Defendant-appellant alleges the court erred in the following.

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

a. By denying the defendant-appellant the right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

b. By rejecting the offer of proof of defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's motion to direct a verdict on counts 2, 3 and 4 of the indictment on the ground of variance.

5. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 2, 3 and 4 of the indictment.

6. The court erred in denying the defendant-appellant's requests for instructions numbered 14 to 34 inclusive.

7. The court erred in denying the defendant-appellant's motion in arrest of judgment.

8. The appeal will be based on additional errors set forth in detail in the assignment of errors.

ASSIGNMENT OF ERRORS.

[Filed May 24, 1943.]

The defendant-appellant alleges that the trial court erred in its orders, decrees, rulings and instructions, and assigns as errors the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred on the rejection of evidence, to which the defendant-appellant objected and took exception during the trial of this cause, to the specific evidence, and the objection thereto are as follows, to wit:

a. In ruling that the defendant-appellant had no right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169, as amended, is arbitrary and capricious.

b. In ruling that the defendant-appellant had no right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169, as amended, was not in conformity with the Emergency Price Control Act of 1942, as amended.

c. In rejecting the offer of proof of the defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169, as amended, is not in conformity with the provisions of the Emergency Price Control Act of 1942, as amended.

4. The court erred in denying the defendant-appellant's requests for instructions numbered 14 to 34, inclusive, as are more specifically set forth in the bill of exceptions.

5. The court erred in denying the defendant-appellant's motion in arrest of judgment.

By his Attorneys,

LEONARD PORETSKY,
HUBERT C. THOMPSON.

CLERK'S CERTIFICATE.**DISTRICT COURT OF THE UNITED STATES.****DISTRICT OF MASSACHUSETTS.**

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the record on appeal in the cause entitled:

No. 16076, CRIMINAL.

UNITED STATES, by Indictment,

v.

ALBERT YAKUS,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said District, this eleventh day of June, 1943.

[SEAL]

JAMES S. ALLEN, *Clerk.*



[fol. 42] Proceedings in Circuit Court of Appeals.

On May 12, 1943, duplicate notice of appeal and statement of docket entries were filed.

Thereafter, to wit, on June 29, 1943, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on August 23, 1943, the following opinion of the Court was filed:

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3885

BENJAMIN ROTTENBERG, et al., Defendants, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

No. 3892

ALBERT YAKUS, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for
the District of Massachusetts.

Before Magruder, Mahoney and Woodbury, JJ.

Leonard Poretsky, John H. Backus, William H. Lewis, for Benjamin Rottenberg et al. Leonard Poretsky, Francis P. Garland, Joseph Kruger, for Albert Yakus. Robert L. Wright, Special Assistant to the Attorney General, Edmund J. Brandon, U. S. Attorney, William T. McCarthy, Joseph J. Gottlieb, Assistant U. S. Attorneys, for United States of America.

OPINION OF THE COURT—August 23, 1943

MAGRUDER, J. In these criminal prosecutions for violations of § 4(a) of the Emergency Price Control Act (56 Stat. 28) by making sales at prices in excess of those

prescribed by an applicable price regulation, the question is squarely presented whether, or to what extent, the trial court may entertain a defense based upon the alleged invalidity of the regulation. The point was left open in *Lockerty v. Phillips*, —U. S. —, decided May 10, 1943.

No. 3885 embraces two indictments, one against Rottenberg, who was president and treasurer of B. Rottenberg Co., Inc., and one against the corporation. The two indictments were consolidated for trial and are here on a consolidated appeal. Each defendant was convicted on several counts of making sales of wholesale cuts of beef in December, 1942, and January, 1943, at prices higher than the maximum prices as determined under Revised Maximum Price Regulation No. 169,¹ in willful violation of § 4(a) of the Act. Sentence of six months in jail and a fine of \$1,000 was imposed upon the individual defendant. The corporate defendant was fined \$1,000.

No. 3892 embraces a similar indictment against Yakus, who was president of the Brighton Packing Company. He was convicted on three counts of making sales of wholesale beef cuts in December, 1942, and January, 1943, at prices higher than the maximum prices established by the aforesaid regulation and was sentenced to jail for six months and fined \$1,000.

The cases were heard together on appeal in this court. They involve essentially the same questions, and hereafter in this opinion reference will be made only to the proceedings in Rottenberg's case.

At various appropriate stages in the proceedings Rottenberg [fol. 45] challenged the constitutionality of the Emergency Price Control Act. The District Court upheld the Act.

The Government introduced sufficient evidence to warrant verdicts of guilty on all the counts which were submitted to the jury.

Rottenberg introduced no testimony except an offer of proof of detailed economic data designed to show that Revised Maximum Price Regulation No. 169 was arbitrary and capricious and failed to provide a fair and equitable margin of profit to slaughterers and wholesalers conducting their business in an efficient manner. The court

¹ 7 F. R. 10,381. The regulation was issued December 10, 1942, to become effective December 16, 1942.

declined to receive the offer of proof on the ground that § 204 of the Act deprived it of jurisdiction to entertain such a defense. Rottenberg duly took exception to this ruling, the correctness of which is the most serious question now before us.

There is first the inquiry whether the Act as a matter of interpretation precludes this sort of defense to the indictments now before us. If so, then we must decide whether it was competent for Congress so to provide "in a statute born of the exigencies of war." *Scripps-Howard Radio Inc. v. Federal Communications Commission*, 316 U. S. 4, 17 (1942).

On July 30, 1941, many months before our country was attacked at Pearl Harbor, the President transmitted to Congress a message setting forth the necessity of legislation to control prices. H. Doc. No. 332, 77th Cong., 1st Sess. He submitted figures to show that inflationary price rises were threatening to undermine our defense effort "unless we act decisively and without delay." After extended consideration the House passed on November 28, 1941, a bill to control prices and rents. H. R. 5990, 77th Cong., 1st Sess. This bill contained quite a different scheme for review of price regulations from what was ultimately enacted. In the first instance review was to be had before a Board [fol. 46] of Administrative Review; any person aggrieved by the decision of such board might petition for review in the appropriate circuit court of appeals. The bill contained no provision corresponding to that now found in § 204(d) of the Act upon which the court below relied in excluding the offer of proof.

On January 2, 1942, the Senate Committee on Banking and Currency reported out the House bill, with substantial amendments, including the review provisions which eventually became law, and which we shall examine in detail later.

The Senate committee report (Sen. Rep. No. 931, 77th Cong., 2d Sess.) pointed out that the House bill had been passed before we entered the war and that the bill needed to be strengthened now that we were embarked upon an "unlimited national mobilization in a war for survival." While the country was concerned with the danger of inflation even before December 7, 1941, "the pressures on the price structure, already enormous, will be multiplied" now that we are engaged in a world war. The committee pictured in vivid terms what would be the disastrous consequences of

inflation by way of sapping our national strength and effort and morale. "Effective price control, under these circumstances, must no longer be delayed." The report added: "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to proceed at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency."

The Emergency Price Control Act of 1942 became law on January 30, 1942.

Section 1(a) of the Act sets forth its purposes and declares that price and rent control are "necessary to the effective prosecution of the present war."

The temporary, emergency character of the legislation was emphasized by the provision in § 1(b) that the Act [fol. 47] "shall terminate on June 30, 1943", or upon such earlier date as the President by proclamation, or the Congress by concurrent resolution, may prescribe.²

Section 2(a) provides that whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the Act, "he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." In establishing any maximum price, he is directed, so far as practicable, to ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, and to make adjustments for such relevant factors as he may determine to be of general applicability. The Administrator is also directed, so far as practicable, before issuing any price regulation, to consult with representative members of the industry affected. Further, to assure that no price regulation would be issued without due consideration by the Administrator of the factors involved, it is required that every price regulation issued by him "shall be accompanied by a statement of the considerations involved in the issuance of such regulation". After a regulation is issued the Administrator is required, if requested by any substantial portion of the industry affected, to appoint an advisory committee truly repre-

² This terminating date has since been extended to June 30, 1944. 56 Stat. 767.

sentative of the industry with whom he shall advise and consult from time to time with respect to the regulation, the form thereof, and classifications, differentiations and adjustments therein. Under § 2(c) any price regulation "may contain such classifications and differentiations, and may provide for such adjustments and reasonable excep-[fol. 48] tions, as in the judgment of the Administrator are necessary and proper in order to effectuate the purposes of this Act."

Section 4(a) provides that it shall be unlawful "for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2, . . ." This subsection is implemented by § 205(b) which provides that any person "who willfully violates any provision of section 4 of this Act" shall, upon conviction thereof, be subject to a fine or imprisonment or both. In § 205(c) it is provided that "the district courts shall have jurisdiction of criminal proceedings for violation of section 4 of this Act."

Sections 203 and 204 provide in detail the procedure for administrative review, and ultimate court review, of price and rent regulations, first in a special court of the United States known as the Emergency Court of Appeals, and then in the Supreme Court, upon certiorari. This special court, created by § 204(c), consists of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. It is given the powers of a district court with respect to the jurisdiction conferred upon it, except that it "shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2."

Under § 203(a), within a period of sixty days after the issuance of any regulation under § 2, "any person subject to any provision of such regulation" may "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." Within thirty days after the filing of such protest "the Administrator shall either grant or deny such protest, in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in [fol. 49] connection therewith. In the event that the Administrator denies any such protest in whole or in part, he

shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

If the Administrator denies such protest, in whole or in part, any person aggrieved by such denial may within thirty days thereafter, under § 204 (a), file a complaint with the Emergency Court of Appeals, specifying his objections and praying that the regulation protested be enjoined or set aside in whole or in part. Upon receipt of service of such complaint it is the Administrator's duty to certify and file with the court a transcript of such portions of the protest proceedings as are material to the complaint. The transcript shall include a statement setting forth, so far as practicable, "the economic data and other facts of which the Administrator has taken official notice." Upon the filing of such complaint "the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding." No objection to such regulation, and no evidence in support of any objection thereto, shall be considered by the court, "unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript." Appropriate provision is made for applications by either party for leave to adduce additional evidence.

Section 204 (b) provides that no such regulation shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation "is not in accordance with law, or is arbitrary or capricious." The effectiveness of any such judgment by the Emergency Court "shall be postponed until the expiration of thirty days from the entry thereof", except that if petition for certiorari is filed with the Supreme Court [fol. 50] within such thirty days, the effectiveness of such judgment "shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."³

³With respect to this provision the report of the Senate committee states: "This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme

The particular provision of the Act upon which the controversy turns in the present cases is found in § 204 (d) as follows:

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation . . . issued under section 2 . . . and of any provision of any such regulation. . . . Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation . . . , or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations . . . or any provision of any such regulation . . . or to restrain or enjoin the enforcement of any such provision.”

Section 205 contains several subsections in aid of enforcing the Act. Subsection (a) authorizes the Administrator to make application to any appropriate court for an order enjoining violations of § 4. Subsections (b) and (c) contain the provisions for criminal prosecution already referred to. Subsection (d) refers to litigation between private parties in which some provision of the Act, or a regulation issued thereunder, may be involved. Subsection (e) [fol. 51] provides that a buyer of a commodity who has paid more than the applicable maximum price may, with some limitations, bring suit against the seller for treble damages in any court of competent jurisdiction. Subsection (f) contains detailed and carefully guarded licensing provisions.

It is the contention of appellants that since the provision of § 204 (d), above quoted, is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside, it should be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; in other words, that none of the regu-

Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.” Sen. Rep. No. 931, 77th Cong., 2d Sess., p. 24.

lar courts shall have jurisdiction to entertain a suit by such person to set aside any provision of the Act or a regulation thereunder or to restrain the enforcement thereof.

This argument overlooks the breadth of the language in § 204 (d). The subsection provides, affirmatively, that the Emergency Court of Appeals, and the Supreme Court on certiorari therefrom, "shall have exclusive jurisdiction to determine the validity of any regulation." Then follows the negative statement of the same idea, significantly expressed in three distinct clauses: Except as provided in § 204, (1) "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation"; (2) "or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act or of a regulation thereunder"; (3) "or to restrain or enjoin the enforcement of any such provision." (2) and (3) refer aptly to injunction suits brought by a person subject to a regulation. (1) is much broader and seems clearly enough to say that no other court shall have jurisdiction or power to consider the validity of any regulation, however the litigation may originate. Since this is a blanket provision it is natural that it is placed in a section which prescribes the [fol. 52] only procedure by which the validity of a regulation may be subjected to court review. It thus became unnecessary to write the same limitation into each of the subsections of § 205 dealing with the various methods of enforcement.

Our interpretation of § 204 (d) is confirmed by the legislative history, if confirmation were necessary. The report of the Senate Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong., 2d Sess.) states (p. 7):

"The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in different circuits on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operation."

And, again, in the same report (pp. 24-25), emphasizing the distinct clauses in the last sentence of § 204 (d):

"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity,

constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

It is thus clear that the limitations of § 204 (d) were intended to apply not only to injunction suits brought by a person affected by a regulation, but also to enforcement proceedings, both criminal and civil, brought under § 205. Any court in which criminal or civil enforcement proceedings are brought may determine the constitutional validity [fol. 53] of the Act itself, but in such proceedings consideration of the validity of a regulation is precluded.

Section 4 (d) provides: "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." Appellants, therefore, were not required to act, but, in effect, the Congressional command to them was that if they chose to act they must act in accordance with an outstanding price regulation until the same is set aside in proceedings directed to that end in accordance with the provisions of §§ 203 and 204.

It is contended that such a command constitutes a denial of due process of law in violation of the Fifth Amendment. We do not think that this is so.

It is beyond all doubt that Congress in the exercise of its war power may control prices as part of a war-time anti-inflation program. *United States v. Macintosh*, 283 U. S. 605, 622 (1931); *Taylor v. Brown*, United States Emergency Court of Appeals, July 15, 1943. This power is "a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation." *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426 (1934). The

validity under the due process clause of the methods selected by Congress for effectuating price control cannot be judged apart from a consideration of the practical necessities of administration. *Jacob Ruppert v. Caffey*, 251 U. S. 264, 299, 301 (1920). "The Constitution as a continuously operating charter of government does not demand the impossible or the impracticable." *Hirabayashi v. United States*, U. S. , June 21, 1943. In *Nebbia v. New York*, 291 U. S. 502, 539 (1934), the court said, "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual [fol. 54] liberty." Since the war-time power of Congress to control prices includes the power to adopt such means to this end as might rationally be considered necessary for the effective administration of the regulatory program, the only question remaining to the courts, under the Fifth Amendment, is whether Congress had any rational basis for its judgment that administrative necessities in a scheme of nation-wide price regulation require that price regulations issued by the Administrator must be generally observed until the regulations are set aside pursuant to the orderly review procedure set forth in the Act. Nothing would seem to be gained by expressing the issue in more esoteric terms to disguise the non-technical nature of the judgment the courts are called upon to make under the Fifth Amendment.

It is common knowledge that the danger of runaway inflation was acute when Congress passed the Emergency Price Control Act. The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities, affecting a wide range of industries, the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started.

Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and

sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. [fol. 55] It was not to be anticipated that he would glory in being "arbitrary or capricious", or that he would be loathe to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable". He is at least as much interested as anybody else in the successful administration of his office.

Furthermore, the Administrator alone has power to recast regulations as circumstances may indicate the need. All that a court could do would be to strike down; it could not draft and put in force a substitute regulation. If a violator could procure an acquittal in a criminal case by convincing the particular district court or jury that the regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal; and for practical purposes enforcement of the regulation in that district would be at an end. In other districts the regulation might be upheld. As the Government well says in its brief: "The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the area in which higher prices prevailed. Producers in low-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities." The same damaging results would follow if the ordinary courts were empowered to set aside a regulation or grant injunctions against its enforcement. If some commodities thus got released from price control, even temporarily, the consequences might well be irretrievable, and, our economy being all of a piece, pressures would develop on other commodities to break through their ceilings. Hence, even the Emergency Court of Appeals (which alone has been given power to set aside a regulation on grounds [fol. 56] not involving the constitutional validity of the Act itself) is not empowered to grant a stay pending the litigation.⁴

⁴See footnote 3, *supra*.

If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation.

In view of these considerations, it is easy to see why Congress chose the particular review procedure set forth in §§ 203 and 204. If a person subject to a regulation believes that it is not generally fair and equitable or causes avoidable hardships or dislocations, he must first make his protest to the Administrator, who is thus given the opportunity to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. The Administrator and his staff, the collective entity known as the Office of Price Administration, develop day by day an expertness in the whole field of price regulation certainly beyond that of the courts, which makes it reasonable that a protest should first be reviewed by this agency. Furthermore, as already pointed out, the Administrator is the only one with power to make adjustments or amendments. The Administrator may be convinced by the protest, and take appropriate action. If so, well and good. If not, further review is available in the Emergency Court and finally in the Supreme Court, on the basis of a proper administrative record and with the benefit of a considered written opinion by the Administrator explaining why he deemed the protest not to be well taken. We have already quoted from the Senate [fol. 57] committee report the reason why judicial review is channeled through this special court.

No doubt, the judicial review thus provided takes some time before a final adjudication can be reached. But it was not to be supposed that meritorious protests would, in the great majority of cases, have to be pressed to the stage of judicial review. As it has worked out, considering the great number of commodities that have had to be regulated and the millions of people who have been subjected to the regulations, there have been surprisingly few complaints filed in the Emergency Court.⁵) So far as individuals may suffer hardship and inconvenience because of the delay involved in

⁵To date 79 complaints have been filed.

the review procedure, this they must bear in the interest of the greater public good resulting from general compliance with the regulations until they are set aside or amended in an orderly way.

The District Court pointed out that in the present cases the regulation was not invalid on its face, but that the question whether it was arbitrary or capricious or failed to conform to the statutory standards depended upon a consideration of extrinsic economic data. In view of the broad separability clause in §303 of the Act, the court quite properly confined its ruling under the Fifth Amendment to the facts of the cases before it. We shall observe the same caution. There might be a difference if the regulation as a pure matter of law were invalid on its face; if, for example, it covered a commodity which, under a proper construction of §302(c), was exempted by Congress from price regulation. Cf. *Davies Warehouse Co. v. Brown*, United States Emergency Court of Appeals, May 28, 1943. We intimate no opinion on this.

We conclude that §204(d), as applied to these appellants, is not bad under the Fifth Amendment.

[fol. 58] The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem. See *Johnson v. United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *American Bond & Mortgage Co. v. United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *Bradley v. City of Richmond*, 227 U. S. 477, 485 (1913); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440-41 (1907); *United States v. Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y., 1908); *Lehigh Valley R. R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3d, 1911). Cf. *White v. Johnson*, 282 U. S. 367, 373 (1931). It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us.

It is not amiss to note that in *Hirabayashi v. United State*, — U. S. —, June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhor-

rent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress.

As a further argument against § 204(d) appellants contend that when Congress in § 205(c) vested in the district courts jurisdiction of criminal proceedings, the judicial power which such courts are thus called upon to exercise is derived from Article III of the Constitution and not from Congress; that the question of the relevancy of evidence offered in a criminal trial raises a question of law which must necessarily be decided by the court in the exercise of its judicial power; and that it is unconstitutional for Congress to take from a court having jurisdiction to try a criminal indictment its judicial power to decide a question of relevancy.

But the answer is, that Congress has not taken from the district courts the judicial power to decide any question of relevancy of proffered evidence. The District Court exercised such power in these very cases. It ruled that the Emergency Price Control Act was a valid enactment, and that under the provisions of the Act the proffered evidence was not relevant. Appellants were indicted, not for a violation of the Administrator's price regulation, but for a violation of § (4)(a) of the Act. Congress has said that it shall be a crime willfully to sell a commodity for a price in excess of that established by an outstanding price regulation, as long as such regulation has not been set aside by the statutory procedure. This is clearly the meaning and effect of the Act, though in § 204(d) Congress has expressed it in terms of denying "jurisdiction or power" to the courts to consider the validity of the regulation. Hence it was entirely immaterial to the criminal liability of these appellants whether Revised Maximum Price Regulation No. 169 might have been set aside had appellants chosen to avail themselves of the procedure set forth in §§ 203 and 204 of the Act.

Nor have appellants been denied the right of a jury trial as guaranteed by the Sixth Amendment. They have had a jury trial on all the issues relevant under the statute.

Finally, the Act is challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator. This point is not well taken. *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126 (1941); *Sunshine*

Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940); *Mulford v. Smith*, 307 U. S. 38 (1939); *Hirabayashi v. United States*, — U. S. —, decided June 21, 1943. The Emergency Price Control Act was upheld as against the challenge of [fol. 60] unconstitutional delegation in *Taylor v. Brown*, decided by the United States Emergency Court of Appeals, July 15, 1943. There is no need to repeat or elaborate what was said there.

The judgments of the District Court are affirmed.

On the same day, to wit, August 23, 1943, the following Judgment was entered:

JUDGMENT—August 23, 1943

This cause came on to be heard June 29, 1943, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof It is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court, Arthur I. Charron, *Clerk*.

Thereafter, to wit, on August 28, 1943, appellant filed a motion for stay of mandate, which was allowed on August 30, 1943; and on August 30, 1943, appellee filed a motion to vacate stay of execution, which was denied on the same day.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is consolidated with No. 375 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 374

SEP 17 1943
CHARLES ELMORE CRIPPLEY

In the
Supreme Court of the United States.

OCTOBER TERM, 1943.

ALBERT YAKUS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

✓ LEONARD PORETSKY,

✓ HAROLD WIDETZKY,

Attorneys for Petitioner.

• Of Counsel:

JOSEPH KRUGER.

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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1943.

**ALBERT YAKUS,
PETITIONER,**

v.

**UNITED STATES OF AMERICA,
RESPONDENT.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

This is a petition for a writ of certiorari to review the final judgment of the Circuit Court of Appeals entered August 23, 1943 (R. 60), affirming the judgment of the District Court for the District of Massachusetts entered April 30, 1943, against the defendant, this petitioner (R. 12).

Statement of the Matter Involved.

The indictment (R. 1-4) charges the petitioner with violations of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, by selling and delivering wholesale cuts of beef at prices higher than the maximum prices as

determined under Revised Maximum Price Regulation No. 169, as amended (7 F.R. 10,381).

At various appropriate stages in the proceedings in the District Court the petitioner challenged the constitutionality of the Act and the validity of the Regulation as follows:

- (1) Motion to quash the indictment (R. 5-10);
- (2) Amended motion to quash the indictment (R. 10-12);
- (3) Offer of proof through the testimony of Prentiss M. Brown, Price Administrator, that the Regulation did not provide an equitable margin of profit, thereby violating the Inflation Control Act of 1942 (56 Stat. 765) (R. 18);
- (4) Offer of proof of detailed economic data designed to show that the Regulation was arbitrary and capricious and would require the defendant, in the efficient conduct of his business, to sell his product at a price lower than the actual cost of production (R. 19-23);
- (5) Requests for instructions to the jury (R. 24-28);
- (6) Motion in arrest of judgment (R. 13-16).

The District Court upheld the Act. It refused to allow the proffered testimony to be given or to consider a defense based upon the invalidity of the Regulation on the ground that § 204(d) of the Act deprived it of jurisdiction to entertain such a defense (R. 18 and 23). The District Court adhered to this position in its charge to the jury (R. 31) and its rulings on requests submitted by the petitioner (R. 24) and on motion in arrest of judgment (R. 15-16). Upon a finding of guilty by the jury the petitioner was sentenced to six months' imprisonment and a fine of \$1000.

The Circuit Court of Appeals unanimously affirmed the judgment of the District Court.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 23, 1943. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended, 28 U.S.C. § 347(a).

Questions Presented.

1. Is the Act constitutional?
2. May a defendant in a criminal prosecution challenge the constitutionality or statutory validity of the Regulation?
3. Is the doctrine of the exhaustion of administrative remedies to be imported into the criminal law?

Reasons for Granting the Writ.

This Court has not yet had occasion to pass upon the constitutionality of the provisions of the Emergency Price Control Act of 1942 other than those pertaining to the exclusive jurisdiction of the Emergency Court of Appeals in a civil suit brought to restrain enforcement of the Act or of regulations issued under it. *Lockerty v. Phillips*, U.S. , decided May 10, 1943.

In that case this Court expressly left open the question presented by the case at bar of whether, or to what extent, the trial court may entertain a defense based upon the invalidity of the Regulation.

In *Bowles v. United States*, U.S. , decided May 3, 1943, a case believed by the Court to present a question of law similar to that reserved in *Lockerty v. Phillips*, *supra*, this Court granted certiorari because of the public importance of the question. The Court, however, disposed of that case without decision of this question.

In *Hirabayashi v. United States*, U.S. , decided June 21, 1943, Mr. Justice Douglas, in his concurring opinion, stated that, if administrative relief were there provided for, whether the administrative remedy would be the only one available or would have first to be exhausted was reserved.

The case at bar, therefore, presents momentous questions of constitutional law and grave questions of administrative and criminal law which have not yet been, but should be, determined by this Court.

Wherefore the petitioner respectfully prays that his petition for a writ of certiorari be granted.

LEONARD PORETSKY,
HAROLD WIDETZKY,
Attorneys for Petitioner.

Of Counsel:

JOSEPH KRUGER.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by the District Court in this case. Its action with respect to the motion to quash was governed by its written opinion on a like motion in the case of *United States v. Rottenberg*, which was then pending before that Court. The *Rottenberg* case was argued before the Circuit Court of Appeals at the same time as the instant case, and the written opinion of the Circuit Court of Appeals embraces both cases. A petition for writ of certiorari is being filed in the *Rottenberg* case within the time limit prescribed for the filing of the petition in the case at bar. The written opinion of the District Court in the *Rottenberg* case appears on pages 59 to 67 of the Record in that case.

The opinion of the Circuit Court of Appeals was handed down on August 23, 1943, and has not yet been officially reported. It appears on pages 43 to 60 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended, 28 U.S.C. § 347 (a).

Statement of the Case.

The basic facts have been summarized in the foregoing petition.

It may be added that the petitioner did not within a period of sixty days after the issuance of the Regulation file a protest with the Price Administrator under § 203 (a) of the Act.

Specification of Errors.

The errors assigned (R. 39-40), upon all of which the petitioner relies, raise in substance the following issues:

1. Did the District Court have the power and the duty to consider the statutory and constitutional validity of the Regulation; and
2. If not, is § 204 (d) of the Act constitutional?

Summary of Argument.

The Act as a matter of interpretation does permit a defense to the indictment based upon the statutory or constitutional invalidity of the Regulation.

If, however, § 204 (d) of the Act does preclude a consideration of the validity of the Regulation, such a command constitutes (1) a denial of due process of law in violation of the Fifth Amendment; (2) an encroachment by Congress upon the judicial power of the courts derived from Article III of the Constitution and not from Congress; (3) a denial of the right of a jury trial as guaranteed by the Sixth Amendment.

Argument.

I.

As a matter of statutory construction the Act does not preclude the District Court from considering the statutory or constitutional validity of the Regulation.

1. Review of administrative regulations is provided for in one section of the Act (§ 204); criminal proceedings for violation of such regulations in an entirely different section (§ 205(c)). It is in the former section, and in that section only, that there appears the provision upon which the Government's argument is based. No such provision

appears in the latter section dealing with criminal proceedings.

2. The draftsman has used terms appropriate only to equity procedure; he has used no terms appropriate to criminal procedure.

3. This, being a criminal and penal statute in its application to the case at bar, should be strictly construed.

4. The restrictive provisions of § 204(d) of the Act apply only to civil proceedings in which the citizen seeks affirmative relief, and not to cases in which the Price Administrator or the Government brings the citizen into court.

Clinkenbeard v. United States, 21 Wall. (U.S.) 65 (1874).

Brown, Admr., v. Wyatt Food Stores, Inc. (D.C. N.D. Tex. 1943) C.C.H. War Law Service 51,003 (not officially reported).

II.

The doctrine of exhaustion of administrative remedies is not applicable to a criminal prosecution.

1. The rule which requires a litigant to exhaust administrative remedies before he resorts to the courts for relief is in essence a rule of equity jurisdiction, invoked by the courts where the litigant is seeking affirmative relief.

2. If the citizen is to be punished criminally for violating an administrative regulation, the court trying him for that crime must determine whether the regulation is valid.

Clinkenbeard v. United States, 21 Wall (U.S.) 65 (1874).

Union Bridge Co. v. United States, 204 U.S. 364 (1907).

Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910).

Stevens, Landowner, 228 Mass. 368 (1917).

Waye v. Thompson, L.R. 15 Q.B. 342 (1885).

See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935).

3. The cases relied upon by the Government do not hold to the contrary and are distinguishable.

4. Under whatever procedural guise it be cloaked, we should recognize that we have here fundamentally the competing claims of two branches of government, with the administrative branch seeking, in the name of war-time expediency, to encroach upon a field, trial by jury in a criminal case, historically and jealously reserved to the judicial branch.

III.

If the provisions of § 204(d) of the Act do purport to preclude a consideration of the validity of the Regulation, such provisions are unconstitutional.

1. Such a command constitutes a denial of due process of law in violation of the Fifth Amendment.

(a) The time within which a person subject to the provisions of a regulation issued under the Act may seek administrative relief is strictly limited—sixty days. Thereafter no such relief is open to him. In the case at bar on the date of the indictment the sixty-day period had elapsed. Such limitation is unreasonable.

(b) In any event, due process of law in a criminal prosecution requires an opportunity to prove at the trial the lack of a rational basis for the legislation being attacked, or lack of authority for the administrative order.

Panama Refining Co. v. Ryan, 293 U.S. 388, 432, 433 (1935).

United States v. Carolene Products Co., 304 U.S. 144, 152 (1937).

2. Such a command constitutes an encroachment by Congress upon the judicial power of the courts.

(a) When Congress in § 205(c) of the Act vested in the District Courts *jurisdiction* of criminal proceedings, the *judicial power* which such courts are thus called upon to exercise is derived from Article III of the Constitution and not from Congress.

Muskrat v. United States, 219 U.S. 346, 356 (1911).

Gilbert v. Priest, 65 Barb. (N.Y.) 444, 448 (1873).

People v. Bruner, 343 Ill. 146 (1931).

(b) The judicial power vested in the District Courts by the Constitution cannot, therefore, be limited, restricted or interfered with by legislative action.

Merrill v. Sherburne, 1 N.H. 199 (1818).

Commonwealth v. Anthes, 5 Gray (Mass.) 185 (1855).

(c) The question of the relevancy of evidence offered in a criminal trial raises a question of law which must necessarily be decided by the court in the exercise of its judicial power, and it is an unconstitutional encroachment by the legislative upon the judicial department for Congress to take from a court having jurisdiction to try a criminal indictment its judicial power to decide a question of relevancy.

See *Gordon v. United States*, 117 U.S. 697, 700 and 705 (1865).

3. Such a command constitutes a denial of the right of a jury trial as guaranteed by the Sixth Amendment.

In all criminal trials according to the settled principles of the common law—the kind of trial guaranteed by the Sixth Amendment—two questions are involved: first, whether there is such a law as the defendant is charged with violating; and second, whether he has violated that law. And it follows necessarily that, in criminal trials according to the settled principles of the common law, the court has not only the power but the duty to say what the law is.

Callan v. Wilson, 127 U.S. 540, 549-550 (1888).

Carpenter v. Winn, 221 U.S. 533, 538-539 (1911).

Commonwealth v. Anthes, 5 Gray (Mass.) 185, 188-189 (1855).

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction, and that to such end a writ of certiorari should issue to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

LEONARD PORETSKY,

HAROLD WIDETZKY,

Attorneys for Petitioner.

Of Counsel:

JOSEPH KRUGER.

APPENDIX.

Statutes Involved.

The Emergency Price Control Act of 1942, 56 Stat. 23, and the Inflation Control Act of 1942, 56 Stat. 765, the pertinent provisions of which are as follows:

PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942.

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various

bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943; or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the

purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, con-

sisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents pre-

vailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any person subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the

transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in

connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness

of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged

in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a

violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f). (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance

on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum

price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by

him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations herein-after provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a

price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

PROVISIONS OF THE INFLATION CONTROL ACT OF 1942.

Section 3. . . . no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or sub-

stantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: . . . Provided further, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing. . . .

The Regulation Involved.

REVISED MAXIMUM PRICE REGULATION No. 169, 7 F.R. 10,381.

§ 1364.451 *Prohibition against selling beef and veal carcasses and wholesale cuts, and processed products at price above the maximum—*(a) *Beef carcasses and wholesale cuts.* On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by § 1364.451; . . .

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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 374.

ALBERT YAKUS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

JOSEPH KRUGER,

HAROLD WIDETZKY,

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Counsel for Petitioner.

Of Counsel:

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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 374.

ALBERT YAKUS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONER'S BRIEF.

Opinions Below.

No opinion was rendered by either the District Court for the District of Massachusetts or by the Circuit Court of Appeals for the First Circuit in this case. Their rulings on the questions here presented were governed by respective opinions filed in the case of *Benjamin Rottenberg and B. Rottenberg, Inc.*, which arose in the same District, was tried separately in the District Court, but on appeal was heard together with this case in the Circuit Court, and is now before this Court on writ of certiorari (*Rottenberg v. United States*, No. 375, present term), having been consolidated with this case for argument. The memorandum opinion of the District Court in the *Rottenberg* case is

reported in 48 F. Supp. 913, and appears at pages 59 to 67 of the record in that case. The opinion of the Circuit Court in that case is reported in 137 F. (2d) 850, and appears in the present record at pages 42 to 56.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on August 23, 1943 (R. 56). The petition for a writ of certiorari was filed in this Court on September 22, 1943, and allowed on November 8, 1943. Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

Statutes and Regulations Involved:

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U.S. Code, Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U.S. Code, Appendix, Supp. II, Sec. 961 *et seq.*), and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, are contained in the Appendix.

Statement of the Case.

The petitioner seeks a review of a judgment of the Circuit Court of Appeals for the First Circuit (R. 56), which affirmed a judgment of conviction against the petitioner in the District Court for the District of Massachusetts (R. 12-13) under an indictment charging sales of wholesale cuts

of beef at prices above the maximum prices determined under Revised Maximum Price Regulation No. 169, as amended (R. 1-5).

At various appropriate stages in the proceedings in the District Court the petitioner challenged the constitutionality of the Act and the validity of the Regulation as follows:

- (1) Motion to quash the indictment (R. 5-10);
- (2) Amended motion to quash the indictment (R. 10-12);
- (3) Offer of proof through the testimony of Prentiss M. Brown, Price Administrator, that the Regulation did not provide an equitable margin of profit, thereby violating the Inflation Control Act of 1942 (56 Stat. 765) (R. 18-19);
- (4) Offer of proof of detailed economic data designed to show that the Regulation was arbitrary and capricious and would require the defendant, in the efficient conduct of his business, to sell his product at a price lower than the actual cost of production (R. 19-24);
- (5) Requests for instructions to the jury (R. 24-28);
- (6) Motion in arrest of judgment (R. 13-16).

The District Court upheld the Act. It refused to allow the proffered testimony to be given or to consider a defense based upon the invalidity of the Regulation on the ground that Sec. 204(d) of the Act deprived it of jurisdiction to entertain such a defense (R. 18-19 and 23-24). The District Court adhered to this position in its charge to the jury (R. 31) and its rulings on requests submitted by the petitioner (R. 24) and on motion in arrest of judgment (R. 15-16).

The Circuit Court of Appeals, in affirming the conviction, held that Sec. 204(d) of the Act operates to bar the attack

sought to be made by the petitioner against the Regulation; and that Sec. 204(d) as so construed is constitutional (R. 42-56).

The Regulation was issued on December 10, 1942 (7 Fed. Reg. 10381). The petitioner was indicted on February 24, 1943 (R. 5). He did not within a period of sixty days after the issuance of the Regulation file a protest with the Price Administrator under Sec. 203(a) of the Act.

Specification of Errors.

The errors assigned (R. 39-40), upon all of which the petitioner relies, present in substance the following questions:

1. Whether Sec. 204(d) of the Emergency Price Control Act of 1942 precludes a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of the Regulation.

2. Whether, if Sec. 204(d) of the Act does preclude such a challenge, the Act contravenes the Fifth and Sixth Amendments of the Federal Constitution and works an unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

Summary of Argument.

POINT I.

As a matter of interpretation Sec. 204(d) of the Emergency Price Control Act of 1942 does not preclude a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of a regulation under the Act.

A. Inquiry should first be made whether the Act as a matter of interpretation precludes this sort of defense to the indictment.

B. An interpretation of the Act which does not preclude this sort of defense is permissible and should be adopted in the instant case.

1. The statutory arrangement would seem to so indicate.

2. The provision of the Act employs terms appropriate to equity procedure; it employs no terms peculiar to criminal procedure.

3. The provision of the Act, being in its application to the instant case a provision in a criminal statute, should be strictly construed in favor of the defendant.

POINT II.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied due process of law under the Fifth Amendment.

The statutory command against the trial court's considering the validity of the Regulation is said to find support in the doctrine of exhaustion of administrative remedies. That doctrine, however, should not be applied in the instant case.

To apply the doctrine of exhaustion of administrative remedies in the instant case constitutes a failure to observe essential fundamental fairness.

A. If the doctrine of exhaustion of administrative remedies is invoked in this case, the petitioner is left with insufficient safeguards against administrative error.

B. The doctrine of exhaustion of administrative remedies will not be applied where, as in the instant case, the available administrative relief is inadequate.

1. The sixty-day time limitation within which to apply for administrative relief renders the administrative remedy inadequate.

2. The lack of proper procedural standards renders the administrative remedy inadequate.

Applying these touchstones to the instant case, it will be seen that—

(a) No notice or opportunity to be heard is required prior to the issuance of a regulation.

(b) The protest procedure provided for in Sec. 203 of the Act, available after the issuance of the regulation, fails to meet the standards applicable to quasi-judicial administrative proceedings.

(c) The scope of judicial review is too restricted. Under Sec. 204(b) the Emergency Court of Appeals is limited to a determination of whether the Regulation is "in accordance with law, or is arbitrary or capricious."

3. A challenge to the constitutionality of the entire Act, such as made in the instant case, renders the administrative remedy inadequate.

C. The doctrine of exhaustion of administrative remedies is not applicable to a criminal prosecution.

POINT III.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied a trial by jury under the Sixth Amendment.

A. The petitioner in the instant case is entitled to a trial by jury as a matter of constitutional right.

B. The guaranty of a trial by jury implies "a trial in that mode and according to the settled rules of the common law." And the impairment of any essential element of such a trial is forbidden.

C. Sec. 204(d) does work such impairment.

POINT IV.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the regulation by way of defense to a criminal prosecution, it works unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

Although Congress may place exclusive jurisdiction of certain proceedings in special tribunals, here there is the difference that jurisdiction is given to a District Court for certain causes of action, yet the important related judicial function of passing on the validity of the order is denied to these same courts.

Argument.

POINT I.

As a matter of interpretation Sec. 204(d) of the Emergency Price Control Act of 1942 does not preclude a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of a regulation under the Act.

A. Inquiry should first be made whether the Act as a matter of interpretation precludes this sort of defense to the indictment.

As stated in *Crowell v. Benson*, 285 U.S. 22, 62 (1931):

“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

B. An interpretation of the Act which does not preclude this sort of defense is permissible and should be adopted in the instant case.

1. The statutory arrangement would seem to so indicate.

Review of administrative regulations is provided for in one section of the Act (Sec. 204); criminal proceedings for violation of such regulations in an entirely different section (Sec. 205(c)). It is in the former section, and in that section only, that there appears the provision precluding consideration of the validity of a regulation. No such provision appears in the latter section dealing with criminal proceedings.

The provision is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside. It should, therefore, naturally be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; that is, that no court other than the Emergency Court of Appeals shall have jurisdiction to entertain a suit by such a person to set aside any provision of the Act or of a regulation thereunder or to restrain the enforcement thereof—the situation in *Lockerty v. Phillips*, 319 U.S. 182 (1943). The provision should be read to apply only to a civil proceeding in which a person subject to a regulation comes into court seeking affirmative relief, not to an enforcement proceeding against such a person.

Clinkenbeard v. United States, 21 Wall. 65, 70-71 (1874).

Brown v. Wyatt Food Stores, 49 F. Supp. 538 (D.C. N.D. Tex., 1943).

2. The provision of the Act employs terms appropriate to equity procedure; it employs no terms peculiar to criminal procedure.

“The draftsman has used apt and familiar words from the Chancellor’s vocabulary, ‘to stay, restrain, enjoin or set aside.’ But since he has not used any terms peculiar to criminal procedure, it might be argued that criminal cases were not within the ban.”

Wyanski, D.J., in *United States v. Slobodkin*,
48 F. Supp. 913, 916 (1943).

3. The provision of the Act, being in its application to the instant case a provision in a criminal statute, should be strictly construed in favor of the defendant.

Krichman v. United States, 256 U.S. 363 (1921).

The court should lean more strongly in favor of the defendant than it would if the statute were remedial.

See *Bolles v. Outing Co.*, 175 U.S. 262, 265 (1899).

POINT II.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied due process of law under the Fifth Amendment.

The statutory command against the trial court’s considering the validity of the Regulation is said to find support in the doctrine of exhaustion of administrative remedies. That doctrine, however, should not be applied in the instant case.

As stated by the Court in *Lisenba v. California*, 314 U.S. 219, 236 (1941):

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

To apply the doctrine of exhaustion of administrative remedies in the instant case does constitute a failure to observe essential fundamental fairness.

A. If the doctrine of exhaustion of administrative remedies is invoked in this case, the petitioner is left with insufficient safeguards against administrative error.

As stated by Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560:

"The courts are groping with greater or less success for formulae to fit the wide variety of situations encountered. They are seeking orderly rules of procedure which will permit freedom of action for administrative agencies engaged in enforcing their respective statutes, and which, at the same time, will provide adequate protection from administrative errors."

The Emergency Price Control Act of 1942 represents a departure from established administrative procedure in providing administrative procedures never before so combined, and each of which sharply cuts down the protection afforded a person subject to the administrative process. For the Act implements its administrative procedure not merely with the doctrine of exhaustion of administrative remedies, requiring both prior resort to the administra-

tive tribunal and the exhaustion of all available administrative remedies before invoking judicial relief, but also with a narrowly restricted period of time within which administrative relief may be sought and after which no remedy whatever is available—"administrative impregnability by estoppel"¹—together with a denial of power to stay an order pending appeal.²

With respect to the last of these features it was said in *United States v. Sosnowitz & Lotstein*, 50 F. Supp. 586, 588-589 (D.C. D. Conn., 1943):

"To be sure, a citizen adversely affected by railroad rates prescribed by the Interstate Commerce Commission may not only apply to a court to have the rates set aside but he may, at least in a proper case, under the Urgent Deficiencies Act, obtain a temporary stay thereof, thereby avoiding the impact of criminal sanctions while his challenge to the validity of the rates is in progress . . . This same safeguard was carried over into the Communications Act of 1934 . . . and into the Packers and Stockyards Act . . .

"And this familiar and salutary technique of administrative review, doubtless due to the press of present urgencies, has been discarded by the draftsmen of E.P.C.A."

And, as it was pointed out in 37 Ill. L. Rev. 256, 264, *Judicial Review of Price Orders under the Emergency Price Control Act*:

"The Price Control Act also differs radically from other recent statutes in this respect. In the Securities Act of 1933, the Securities Exchange Act of 1934, and

¹ Note, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 Harv. L. Rev. 1251, 1264.

² Sections 204(b), 204(c), 204(d).

the Public Utility Holding Company Act, the reviewing court can stay the effectiveness of an order pending appeal, and there is no provision in the jurisdiction of offenses sections prohibiting the enforcing court from passing on the validity of the orders. Under the Fair Labor Standards Act, enforcing courts are not prohibited from considering the constitutionality and validity of wage orders. The same is true under the AAA of 1938, and, in addition, the farmer who has paid a penalty for exceeding what turned out to be an invalid quota may sue for refund."

And also at pages 263-264 of the same article:

"The practical result, then, of the exclusive jurisdiction provision is to give to administrative action a finality hitherto unknown. It finds no precedent in other statutes vesting exclusive jurisdiction in certain courts, as for example, the National Labor Relations Act. The vesting of exclusive jurisdiction in the Circuit Court of Appeals under that act is scarcely analogous here, for there is no criminal penalty for violation of an order of the N.L.R.B. until the Board has petitioned a Circuit Court for enforcement of its order. Thus an order must be obtained from the court which also has the exclusive right to review the Board's order. With enforcement and review in the same court, there is no danger of enforcing what may turn out later to be an invalid order."

It should be noted, moreover, that under the Act the issuance of regulations is a quasi-legislative action for which no notice is said to be required. See *Hearings before the Committee on Banking and Currency*, House of Representatives, 77th Congress, First Session, on H.R. 5479, pp. 328-333; Nathanson, *The Emergency Price Con-*

trol Act of 1942: Administrative Procedure and Judicial Review, 9 *Law and Contemporary Problems*, 60, 62.

The cases invoking the doctrine of exhaustion of administrative remedies, however, are cases dealing with quasi-judicial action, for which notice must be given to those interested before action is taken. See, for example, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Pren-tis v. Atlantic Coastline Co.*, 211 U.S. 210 (1908). The fairness of applying the doctrine to the instant case is, therefore, to say the least, open to doubt. See *American Economic Mobilization*, 55 *Harv. L. Rev.* 427, 493; *Administrative Features of the Emergency Price Control Act*, 28 *Va. L. Rev.* 991, 999.

Although, of course, any one of these administrative features singly, or perhaps in combination with another, would not so restrict as to constitute a denial of due process, the cumulative deprivations of all these features in combination do work such a denial. The result of such a combination is a situation in which, once sixty days after the promulgation of the regulation has elapsed, there is no tribunal to which a person subject to the regulation may turn to seek relief and in which an enforcing court cannot consider the validity of the regulation which it is enforcing and for the violation of which it may fine and imprison.

B. The doctrine of exhaustion of administrative remedies will not be applied where, as in the instant case, the available administrative relief is inadequate.

The rule which requires a litigant to exhaust administrative remedies before he may invoke judicial relief is in essence a rule of judicial administration in the field of equity jurisdiction. See *Myers v. Bethlehem Corp.*, 303 U.S. 41, 51 (1938).

"The tendency to assimilate the presence of an administrative remedy to the availability of an adequate

remedy at law, clearly articulated in the later cases, made itself felt from the outset. From the beginning, the exhaustion rule was formulated in terms of *equity jurisdiction*, that is to say, a litigant who failed to avail himself of administrative avenues of redress could not 'maintain a suit in equity'."

Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 985-986.

1. The sixty-day time limitation within which to apply for administrative relief renders the administrative remedy inadequate.

The harsh doctrine of estoppel barring a collateral attack upon a void order by a statutory time limit has hitherto been confined to the tax field. See Stason, *op. cit.*, 580. In that field there is a certain justification for invoking such a penalty, harsh though it may be. Public revenues must be fixed and certain; the account books of the governmental body must be closed.

Even in the tax field this harsh doctrine will not invariably be applied. Even there the time limit must be sufficient to allow the collection of evidence and preparation of the case. If the allotted time is insufficient for that purpose, judicial relief will be afforded.

Munn v. Des Moines National Bank, 18 F. (2d) 269 (C.C.A. 8th, 1927).

"If, however, in other areas of administrative law reasons of public need of summary disposition of the cases are not present, the doctrine is too harsh to be applied. In such areas of administrative action, if the administrative remedy is still open, the doctrine of exhaustion should be applied and the party litigant should be forced to complete the administrative process. If, however, the administrative door is closed

by lapse of time, the litigant should be permitted his judicial redress regardless of the failure to take all administrative steps except in cases where his failure to take such steps is the result of gross carelessness or deliberate design."

Stason, *op. cit.*, 580-581.

The reasons advanced for implementing the Emergency Price Control Act with this harsh and drastic penalty appear to be scarcely compelling. As stated by David Ginsburg, Esq., general counsel of O.P.A. in the brief submitted at the Price Control Hearings of the Senate and printed as part of the record of those hearings, it is that this procedure assures timely readjustment of ceilings—by imposing the sixty-day limitation the Administrator will learn immediately what practical effect his order has.³

³ *Hearings before the Committee on Banking and Currency, United States Senate, 77th Congress, First Session, on H.R. 5990, p. 250:*

"5. The protest procedure assures timely readjustment of ceilings.—A comprehensive picture of the operation of any price ceiling on business is essential for the equitable treatment of individual business and for effective price control. By providing for the filing of protests within 60 days after the issuance of a price ceiling regulation, the committee bill assures that the Administrator will learn immediately what practical effect his order has. ~~Formal~~ hearings on single protests would supply the Administrator with information piecemeal. Only after large numbers of businessmen had appeared in successive adversary proceedings could the Administrator begin to get an overall view of the regulated industry. It is wholly impractical to attempt to judge the needs of a large group of businessmen in a proceeding between the Administrator and a single member of the group. The committee provision for simultaneous presentation of the views of all the business affected makes possible adjustments in the ceiling which are both equitable for individual businessmen and consistent with a reasoned and coherent price program.

"The selection by the committee of a flexible procedure, adapted to the realities of regulation and designed especially for the presen-

In view of the fact that the order of the Administrator is effective when issued, and is issued without notice to or opportunity to be heard by those subject to it, and in view of the fact that this is an entirely new procedure and technique, thereby making it probable that many of those persons (particularly the small business man, such as this petitioner) will be unaware of the very existence of the order, and will certainly not know of the sixty-day limitation,⁴ the reasons stated appear disingenuous.⁵ A rapid, accurate readjustment of ceilings protecting all elements in the business community is to be assured by rapidly and decisively cutting off all rights to any readjustment whatsoever.

In any event, the time allotted for the collection of evidence and preparation of the case, sixty days, is insufficient for that purpose.

If, in accordance with the decision in the *Munn* case, *supra*, the defendant must be allowed a sufficient time in which to collect his evidence and to prepare his case, the inadequacy of a sixty-day period for that purpose is apparent.

It should first of all be borne in mind that the full sixty-day period may not be available in any given case—the

tation of economic data in the most informative fashion, assures that the price control authority will function rapidly, accurately, and with proper regard for all elements in the business community."

⁴ See *Payne v. Griffin*, 51 F. Supp. 588, 596 (D.C. M.D. Ga., 1943).

⁵ See *Second Intermediate Report of the Select Committee to Investigate Executive Agencies*, House of Representatives, 78th Cong., First Sess., p. 4:

"... one of the purposes of the legislation which they [the Price Administrator and his counsel] drafted was to place, so far as possible, final and non-reviewable power and authority in the hands of the Administrator to be created by the proposed legislation."

person desiring to protest may not have learned of the regulation or become familiar with its provisions and its impact upon him until well after its issuance—particularly is this true of so involved and complex a regulation as that in the instant case.

Secondly, it must be realized that the protest is to the Regulation itself—a regulation which covers not merely the protestant's business, but the entire industry which is sought to be regulated. The full comprehension of such a regulation, the Circuit Court in its decision in the instant case has declared (R. 51), "is a lifetime study." The proponents of the Act in the Congressional Hearings have likewise adverted to the infinite complexity of the subject-matter.

"... the matters in dispute involve the application of expert and informed judgment to complex economic facts. . . ."

"In protest proceedings, however, the facts are impersonal and endlessly complex." ⁷

2. The lack of proper procedural standards renders the administrative remedy inadequate.

Kansas City Southern Ry. Co. v. Ogden Levee District, 15 F. (2d) 637 (C.C.A. 8th, 1926).

The procedural provisions of the Act do not afford due process of law under the Fifth Amendment.

⁶ *Hearings before the Committee on Banking and Currency*, House of Representatives, 77th Congress, First Session, on H.R. 5479, at p. 329.

⁷ *Hearings before the Committee on Banking and Currency*, United States Senate, 77th Congress, First Session, on H.R. 5990, at p. 250.

Daniel Webster's often-quoted definition of due process appears in the *Dartmouth College Case*, 4 Wheat. 518, 581 (1819):

"a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

As applied to the field of administrative regulation this has been stated by Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1935):

"The inexorable safeguard which the due process clause assures is . . . that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

As stated by Mr. Chief Justice Hughes in *Morgan v. United States*, 304 U.S. 1, 14-15, 18-19:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the

administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'.

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Applying these touchstones to the instant case, it will be seen that

(a) No notice or opportunity to be heard is required prior to the issuance of a regulation.

Under Sec. 2(a) the Administrator is given the power, whenever in his judgment the price of a commodity has risen or threatens to rise to an extent or in a manner inconsistent with the purposes of the Act, by regulation to establish such maximum price as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Before issuing any regulation, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected. Any hearing, therefore, which may be given prior to the issuance of the regulation is wholly discretionary.

The right to a hearing, however, must rest on a basis more substantial than favor or discretion. See *Roller v. Holly*, 176 U.S. 398, 409 (1900). A hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law that the Constitution requires. See *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

It has been urged, however, that no hearing need be provided because of the analogy to legislative enactments without hearing—since the legislature may act without notice and opportunity to be heard, the administrative agency to which legislative power has been delegated may act likewise. The analogy, however, is far from complete. See *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 197 (1933). In the legislative process before a bill becomes law it is subjected to study by a committee, hearings, debate, report, public criticism and a publicly recorded vote. See Freund, *Administrative Powers Over Persons and Property* (1928), p. 220. Moreover, as stated by Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process*, 51 Yale L.J. 1093, 1115:

"A legislature is a representative body whose members are supposed to and to a large extent do reflect the will of their constituents. Those affected by a pending measure are not denied opportunity for participation in the determination, for they are presumably represented within the legislature itself. This element of representation is usually lacking in the administrative process. When private parties tend to obstruct an agency in gaining its objectives, those parties seldom have spokesmen among the membership of the agency. If their arguments and evidence are to enter into the formulation of the governmental action, special procedural devices must be made avail-

able—something in addition to what a legislature provides.”

Denominating the proceeding as “legislative,” moreover, does not solve the problem. In *Morgan v. United States*, 298 U.S. 468, 479 (1936), the Court did require a judicial hearing although it termed the rate-making proceeding (a species of price fixing) as legislative in character. An opportunity for a hearing must be afforded. *Londoner v. Denver*, 210 U.S. 373 (1908). *Chesebro v. Los Angeles County Flood Control District*, 306 U.S. 459 (1939). *McGrew v. Industrial Commission*, 96 Utah, 203 (1938). And such opportunity must be afforded before the regulation becomes effective. See *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 153 (1941).

The character of the enforcement which attaches to a regulation must be borne in mind in considering the procedure adapted to its formulation. As stated by Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 271-272:

“When, however, a regulation presents affected parties with the alternative of compliance or loss of property or liberty, with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it.”

In the instant case, since the Act provides for “stringent criminal sanctions”^{*} with a most narrowly restricted opportunity to challenge the correctness of the Regulation, the need for opportunity to influence its content and to be heard prior to its becoming effective is a most urgent one.

^{*} *Administrative Features of the Emergency Price Control Act*, 28 Va. L. Rev. 991, 1000.

To the argument of the necessity for haste there is the statement of Mr. Justice Cardozo in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304-305:

"The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

(b) The protest procedure provided for in Sec. 203 of the Act, available after the issuance of the regulation, fails to meet the standards applicable to quasi-judicial administrative proceedings.

It should be noted that in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 47 (1938), the Court in passing upon the adequacy of the available administrative remedy emphasized that—

"There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied."

(i) There is no hearing of right. By Sec. 203(c) "Any proceeding under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs." In other words, a hearing is not of right and the Administrator may limit the proceedings to written evidence only. Such procedure does

not satisfy the requisites of due process.⁹ *Londoner v. Denver*, 210 U.S. 373 (1908). See Rava, *Procedure in Emergency Price Fixing*, 40 Mich. L. Rev. 937, 963-964; and Reid and Hatton, *Price Control and National Defense*, 36 Ill. L. Rev. 255, 289.

(ii) The Administrator may consider evidence of which the protestant is not informed. By Sec. 203(b) the Administrator may take official notice of economic data and other facts, including facts found by him in his studies and investigations. And the protestant need not be informed of the Administrator's contentions, except in the decision of denial—Sec. 203(b). The protestant is thus deprived of a *viva voce* hearing, of the rights of cross-examination, of the opportunity to meet and rebut adverse evidence, and of presenting an argument based upon a knowledge of all the evidence and the contentions of the Administrator. Such procedure denies due process of law.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937).

Morgan v. United States, 304 U.S. 1 (1938); 298 U.S. 468 (1936).

(iii) Speedy administrative determination is not assured. Sec. 203(a) provides that within thirty days after the filing of the protest "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present

⁹ The shortened procedure of the Interstate Commerce Commission sometimes cited as a precedent may be employed only with consent of the parties. If any of the parties, including interveners, refuses consent, hearing must be held. See *Report of Attorney General's Committee on Administrative Procedure*, Senate Document No. 8, 77th Congress, 1st Session (1941), 406.

further evidence in connection therewith." This provision is scarcely effective because no further time limit is fixed within which final action must be taken.¹⁰ It should be weighed in the light of the fact that no stay of the Regulation may be granted save by the Emergency Court of Appeals upon judicial review of a denial of the protest. Sec. 204(d). *Lockerty v. Phillips*, 319 U.S. 182 (1943). If, as claimed in the instant case, the maximum prices set by the Regulation are confiscatory, irreparable injury must ensue.

(c) The scope of judicial review is too restricted. Under Sec. 204(b) the Emergency Court of Appeals is limited to a determination of whether the Regulation is "in accordance with law, or is arbitrary or capricious." No inquiry may be made into the correctness of the Regulation even to see if it is supported by substantial evidence. Since validity of a regulation depends on facts concerning an entire industry, a single violator in that industry may be in no position adequately to contest the regulation. See *Legal and Economic Aspects of Wartime Price Control*, 51 Yale L.J. 819, 846. Such a limited review does not accord with due process of law.

Southern Railway Co. v. Virginia, 290 U.S. 190 (1933).

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1935).

¹⁰ In practice this provision appears to have had an unfortunate history of being used by the Administrator for delay. See *Second Intermediate Report of the Select Committee to Investigate Executive Agencies*, House of Representatives, 78th Congress, 1st Session, pp. 6-7; and the *Third Intermediate Report* of that Committee, pp. 3-4.

3. A challenge to the constitutionality of the entire Act, such as made in the instant case, renders the administrative remedy inadequate.

Prior resort to the administrative body is not required when the constitutionality of an entire statute is questioned rather than the validity of some regulation under the statute. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Buder v. First Nat. Bank in St. Louis*, 16 F. (2d) 990 (C.C.A. 8th, 1927); cert. den. 274 U.S. 743 (1927). See *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 Harv. L. Rev. 1251, 1263. See also Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560, 575.

C. The doctrine of exhaustion of administrative remedies is not applicable to a criminal prosecution.

1. It is, as we have seen, in essence a rule of equity jurisdiction invoked by the courts in civil proceedings where the litigant is seeking affirmative relief—usually invoking the extraordinary injunctive powers of the court. See *Myers v. Bethlehem Corp.*, 303 U.S. 41, 51, note 9 (1938).

Its very concept is alien to the field of our criminal law; where, far from restricting the opportunities of the defense, our law sedulously seeks to safeguard those opportunities.

2. As a matter of policy the doctrine has no place in the criminal law.

As was stated by Gellhorn, *Administrative Law—Cases and Comments*, p. 449:

“Imprisonment as a deterrent of anti-social behavior is traditionally the earmark of the criminal law. The processes of the criminal law, fortified by federal

and state constitutional provisions, are calculated to furnish safeguards against arbitrary deprivations of liberty of the person. So long as imprisonment may be the sanction, should we not be able to insist that, however the statute may dominate the proceeding, it is in fact and in custom a criminal proceeding, to be disposed of in accordance with the practice developed in that branch of jurisprudence?"

3. This policy is applied in passing upon the validity of administrative regulations carrying criminal sanctions.

As stated in the Note, *Validity of Federal Departmental Regulations Involving Criminal Responsibility*, 35 Harv. L. Rev. 952:

"Assuming that the defendant has violated a departmental regulation, for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers conferred upon the department by Congress. Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits exercised by Congress."

The courts will, if the regulation is enforceable by penal sanction, carefully scrutinize the regulation to determine whether or not it comes within the scope of the authority conferred by the statute. If it does not, it will be held void and of no effect.¹¹ *United States v. Eaton*, 144 U.S. 677

¹¹ As to the admitted invalidity of the Regulation in the instant case see Testimony of Prentiss M. Brown, Price Administrator, at *Hearing before Subcommittee of Committee on Agriculture and Forestry of the United States Senate*, March 3, 1943, pp. 749-750 and pp. 760-761 (Rottenberg Record, pp. 25-26); see also his testimony at *Hearings before the Select Committee to Conduct a Study*

(1891). *State v. Retowski*, 6 W. W. Harr. (36 Del.) 330
 (1934). *People v. Ryan*, 267 N.Y. 133 (1935). See *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936); stating that a regulation which "operates to create a rule out of harmony with the statute, is a mere nullity;" see also dissenting opinion of Mr. Justice Jackson in *Exiles v. United States*, 319 U.S. 33, 38 (1943), stating:

"But I would not readily assume that . . . Courts must convict and punish one for disobedience of an unlawful order by whomsoever made"—

and see also *Vierck v. United States*, 318 U.S. 236, 241 (1943), stating:

"One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress"—

and see also Schwenk, *The Administrative Crime*, 42 Mich. L. Rev. 51, 64.

4. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable.

and Investigation of the National Defense Program in its Relation to Small Business in the United States, House of Representatives, 78th Congress, 1st Session, on H.R. 18, April 8 and 9, 1943, Part 5. (Unrevised); see also testimony of R. V. Gilbert, Economic Adviser to the Administrator at *Hearings before the Committee on Agriculture*, House of Representatives, 78th Congress, 1st Session, October 26, 1943, pp. 37 and 38; and see also *Third Intermediate Report of the Select Committee to Investigate Executive Agencies*, House of Representatives, 78th Congress, 1st Session, November 29, 1943, pp. 1 and 3.

In the cases analogous to penal proceedings, dealing with the seizure and confiscation of the property of rebels, arising out of the stresses of another great national war crisis, this Court has so declared.

McVeigh v. United States, 11 Wall. 259 (1870).

Windsor v. McVeigh, 93 U.S. 274 (1876).

In each of these cases the United States, under an Act of Congress passed in 1862, filed a libel in a District Court for the forfeiture of the defendant's property, alleging that the defendant was engaged in armed rebellion against the United States. The defendant appeared by counsel, made a claim to the property and filed an answer. The court, on motion of the United States Attorney, struck the claim, answer and appearance from the files, as it appeared from the answer filed that the defendant was a rebel.

Subsequently the defendant was defaulted and a decree of condemnation entered.

In the first of these cases Mr. Justice Swayne said at page 267:

"The order in effect denied the respondent a hearing. It is alleged that he was an alien enemy, and hence could have no *locus standi* in the forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And in the second of these cases Mr. Justice Field said at page 277:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting

his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus entered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

Compare *Hovey v. Elliott*, 167 U.S. 409 (1897).

And see *Rogers v. Peck*, 199 U.S. 425, 435 (1905):

"Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." (Emphasis supplied.)

It is submitted that the principle of these cases should be applied to the instant case.

POINT III.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied a trial by jury under the Sixth Amendment.

A. The petitioner in the instant case is entitled to a trial by jury as a matter of constitutional right.

Callan v. Wilson, 127 U.S. 540 (1887).

District of Columbia v. Colts, 282 U.S. 63 (1930).

See *Schick v. United States*, 195 U.S. 63 (1904).

See also *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

See also Frankfurter and Corcoran, *Petty Federal Offenses and Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917.

Cf. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

The crime charged here is not a petty offense. It is both an "offense of a grave character, affecting the public at large,"¹² and the punishment prescribed is "stringent."¹³ Either one of these elements is sufficient.

See *District of Columbia v. Clawans*, 282 U.S. 63 (1930).

The gravity of the situation which the Act was intended to meet need scarcely be labored. See *Message from the President of the United States Transmitting Request for Legislation Stabilizing the Price of Various Commodities and Rentals*, House Document 332, 77th Congress, 1st Session, dealing with the threat of inflation to the defense effort and the necessity for its control.

¹² *Callan v. Wilson*, 127 U.S. 540, 556 (1887).

¹³ *Administrative Features of the Emergency Price Control Act*, 28 Va. L. Rev. 991, 1000.

The punishment prescribed was severe. Sec. 205(a) prescribes imprisonment of not more than one year or fine of not more than \$5000; or both. In *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937), the Court felt that a punishment of not more than ninety days applicable to an otherwise trivial offense left the question "not free from doubt."

B. The guaranty of a trial by jury implies "a trial in that mode and, according to the settled rules of the common law."¹⁴ And the impairment of any essential element of such a trial is forbidden.¹⁵

It therefore follows that, as was stated in the note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 Harv. L. Rev. 282:

"A judicial determination that a constitutional guarantee of trial by jury is applicable to a statute attempting to establish an administrative procedure must of necessity result, if not in the complete abandonment of the plan, in a substantial reduction in the powers and effectiveness of the Administrative body. This is so because the trial by jury contemplated in the federal and state constitutions not only requires the submission of questions of fact to a group of impartial men, but demands a trial in a court with a judge to guide the jury in the performance of its functions."

In *Wong Wing v. United States*, 163 U.S. 228 (1936), it was held that a Congressional Act providing for administrative action enforceable by severe criminal sanctions must, to be valid, provide for a *judicial* trial to establish the guilt of the accused. The Court stated at page 237:

¹⁴ *Callan v. Wilson*, 127 U.S. 540, 549 (1887).

¹⁵ *Patton v. United States*, 281 U.S. 276 (1930).

"It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

See dissenting opinion of Mr. Justice Brandeis in *United States v. Moreland*, 258 U.S. 433, 443 (1922).

The cases, in the words of the Court at page 290 in *Patterson v. United States*, *supra*, "demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention to the Constitution."

Thus a defendant enjoying the right of jury trial is secured "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."¹⁶ He cannot be required to try his case first before a tribunal without a jury, with the right of jury trial on appeal.¹⁷

He has a right to a jury of twelve men and not less, all of whom remain identical from the beginning to the end, and he may not, if he wishes, waive that right. *Thompson v. Utah*, 170 U.S. 343 (1898). The continuous presence of the same judge is equally essential. *Freeman v. United States*, 227 Fed. 732 (C.C.A. 2d, 1915). See Note, 114 A.L.R. 435.

He has the right to have the jury pass on the entire matter in issue. If the verdict finds only a part of that which is in issue, it is bad. *Patterson v. United States*, 2 Wheat. 221 (1817). *Hodges v. Easton*, 106 U.S. 408 (1882). He is entitled to have the judge instruct the jury as to the law and to advise them on the facts. See *Capital Traction Company v. Hof*, 174 U.S. 1, 13-14 (1899).

¹⁶ *Callan v. Wilson*, 127 U.S. 540, 557 (1887).

¹⁷ *Id.*; cf. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

Since every criminal prosecution inquires: "First. Is there such a law as it is alleged in the indictment that the person accused has violated? Second. Has the person accused done the act or acts, which it is alleged in the indictment he has done?"¹⁸ it must inescapably follow from the integrity of all the essential elements of trial by jury that Congress cannot require that a defendant submit the first inquiry which must be made during the course of the prosecution to some other tribunal; nor require that the jury shall be barred from hearing facts testing the validity of the applicable law, and the judge from instructing the jury thereon.

As was stated in the concurring opinion in the case of *Tot v. United States*, 319 U.S. 463, 473 (1943), in connection with the question of the construction and validity of a presumption contained in the Federal Firearms Act:

"The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of the statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense."

In order to avoid constitutional difficulties in the administrative field, legislatures have resorted to two provisions: "(1) an appeal from the administrative ruling to a court where a jury will try the factual questions de novo, (2) an appeal to a court and a jury, with the administrative finding operating as prima facie evidence of the facts contained therein."¹⁹ The first of these devices, as has been shown, is barred in cases involving serious criminal offenses. The right of confrontation contained in the Sixth

¹⁸ *Commonwealth v. Anthes*, 5 Gray (Mass.) 185, 188 (1855).

¹⁹ Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 Harv. L. Rev. 282.

Amendment bars the second. *Dowdell v. United States*, 221 U.S. 325 (1911). *Soto v. United States*, 273 Fed. 628 (C.C.A. 3d, 1921). The second of these devices is permissible in civil cases because, the findings being merely prima facie evidence, the "parties will remain as free to call, examine, cross-examine witnesses as if the report had not been made." *Ex Parte Peterson*, 253 U.S. 300, 311 (1920).

The prohibition in Sec. 204(d) against consideration of the validity of the Regulation is analogous in its impact to a conclusive presumption against the defendant. As shown by *Tot v. United States*, 319 U.S. 463 (1943), even a lesser presumption would obtain short shrift.

See *Bailey v. Alabama*, 219 U.S. 219 (1911).

POINT IV.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, it works unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

Although Congress may place exclusive jurisdiction of certain proceedings in special tribunals, here there is the difference that jurisdiction is given to a District Court for certain causes of action, yet the important related judicial function of passing on the validity of the order is denied to these same courts.

See *Legal and Economic Aspects of War Time Price Control*, 51 Yale L.J. 819, 846.

The distinction is that between the jurisdiction of a Court and its judicial power.

A. The jurisdiction of the District Court, which was established by Congress under Article III, Sec. 1, of the

Constitution; is vested by congressional enactment. Congress has determined that the District Court within the District of Massachusetts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States." Title 28, U.S.C., Sec. 41 (2). Title 18, U.S.C., Sec. 546 provides: "The crimes and offenses defined in this title shall be cognizable in district courts of the United States." Sec. 205(c) of the Emergency Price Control Act of 1942, as amended, provides that "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act."

From the foregoing it is clear beyond controversy that Congress has vested in the District Court jurisdiction of criminal cases involving violations of this Act. Jurisdiction of a particular court is that portion of the judicial power which it has been authorized to exercise by the Constitution or by valid statutes.

See *Hopkins v. Commonwealth*, 3 Met. 460, 462 (1842).

Foltz v. St. Louis & S.F. Ry. Co., 60 Fed. 316, 318 (1894).

Binderup v. Pathe Exchange, 263 U.S. 291, 305 (1923).

B. The "judicial power" of the District Court, however, is derived, not from Congress, but from the Constitution. Article III, Sec. 1, of the Constitution provides as follows:

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

Article III, Sec. 2, of the Constitution provides as follows:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

Judicial power is the power of a court to decide and pronounce a judgment and to carry it into effect between persons and parties who bring a case before it for decision.

See *Muskrat v. United States*, 219 U.S. 346, 356 (1910).

Kuhnert v. United States, 36 F. Supp. 798; aff. 124 Fed. (2d) 824 (C.C.A. 8th) (1941).

C. The attributes which inhere in the judicial power and are inseparable from it can neither be abrogated nor rendered practically inoperative.

In *Morrow v. Corbin*, 122 Tex. 553, 560 (1933), the Court said:

"The jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes (1) The power to hear the facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the question of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, (5) and the power to execute the judgment or sentence."

See *Michaelson v. United States*, 266 U.S. 42, 66-67 (1924).

See also *United States v. Klein*, 13 Wall. 128 (1871).

Commonwealth v. Anthes, 5 Gray (Mass.) 185 (1855).

Merrill v. Sherburne, 1 N.H. 199 (1818).

In the instant case, by precluding the trial court from considering the validity of the Regulation, Congress has abrogated the judicial power and rendered it practically inoperative. The court is unable to exercise its inherent function.

Under whatever procedural guise it be cloaked, we should recognize that we have here fundamentally the competing claims of two branches of government, the administrative and judicial branches.

We should recognize that the administrative branch is here seeking, in the name of war-time expediency, to encroach upon a field—trial by jury in a criminal case—historically and most jealously reserved to the judicial branch. We should recognize that to permit this is to deprive the citizen of a keystone in the arch of his civil liberties, one upon which his other liberties may in time depend.

As Blackstone warned in reference to a new mode for the trial of crimes:

“And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.”

4 Bl. Commentaries, 350.

Conclusion.

It is therefore submitted that the District Court committed reversible error in its rulings which were affirmed by the Circuit Court of Appeals.

Wherefore the petitioner prays that the judgment be reversed.

Respectfully submitted,

ALBERT YAKUS,

By his Attorneys,

JOSEPH KRUGER,

HAROLD WIDETZKY,

LEONARD PORETSKY.

Of Counsel:

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[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator; and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed \$250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206; he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

[PUBLIC LAW 729—77TH CONGRESS]

[CHAPTER 578—2D SESSION]

[H. R. 7565]

AN ACT

To amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity

was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

SEC. 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of \$5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week.

Sec. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe.

Sec. 7. (a) Section 1 (b) of the Emergency Price Control Act of 1942 is hereby amended by striking out "June 30, 1943" and substituting "June 30, 1944".

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

Sec. 8. (a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncooperators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended, shall, insofar as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war.

SEC. 9. (a) Section 4 (a) of the Act entitled "An Act to extend the life and increase the credit resources of the Commodity Credit Corporation, and for other purposes", approved July 1, 1941 (U. S. C., 1941 edition, Supp. I, title 15, sec. 713a-8), is amended—

(1) By inserting after the words "so as to support" a comma and the following: "during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares the hostilities in the present war have terminated,".

(2) By striking out "85 per centum" and inserting in lieu thereof "90 per centum".

(3) By inserting after the word "tobacco" a comma and the word "peanuts".

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4 (a), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4 (a).

SEC. 10. When used in this Act, the terms "wages" and "salaries" shall include additional compensation, on an annual or other basis paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

Approved, October 2, 1942.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 374

ALBERT YAKUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The district court and the Circuit Court of Appeals for the First Circuit did not render opinions in this case. Their rulings on the questions here presented were governed by respective opinions filed in the companion case of *Benjamin Rottenberg and B. Rottenberg, Inc.*, which arose in the same District and is now before this Court in proceedings on petition for a writ of certiorari (*Rottenberg v. United States*, No. 375, present Term). The memorandum opinion of the district court in the *Rottenberg* case is reported in 48 F. Supp. 913

and appears at pp. 59-67 of the Record in that case. The opinion of the circuit court of appeals in that case appears in the present Record at pp. 42-56.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on August 23, 1943 (R. 56). The petition for a writ of certiorari was filed in this Court on September 22, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204 (d) of the Emergency Price Control Act of 1942 operates to prevent consideration of the validity of maximum price regulations in criminal or other suits for enforcement of the Act.

2. Whether Section 204 of the Act, in providing an exclusive procedure for review of maximum price regulations under the Act, and in prohibiting consideration of the validity of such regulations in suits to enforce the Act, contravenes the Fifth and Sixth Amendments of the Federal Constitution and works an unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

STATUTES AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U. S. Code, Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U. S. Code, Appendix, Supp. II, Sec. 961 *et seq.*) and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, are contained in the Appendix to the Government's Memorandum filed in the companion case of *Rottenberg v. United States, supra*. The applicable provisions are summarized in that Memorandum at p. 3 thereof.

STATEMENT

Petitioner seeks review of a judgment of the Circuit Court of Appeals for the First Circuit which affirmed a judgment of conviction against petitioner in the District Court for the District of Massachusetts (R. 12) under an indictment charging sales of wholesale cuts of beef at prices above the maximum legal prices established by Revised Maximum Price Regulation No. 169 (R. 1-4). Petitioner was found guilty under three counts, and received a concurrent sentence of six months imprisonment and one thousand dollars fine on each count (R. 13).

Petitioner filed a plea of not guilty in the District Court (R. 5), but offered no testimony in

disproof of the violations charged. The District Court overruled a number of motions and requests for rulings raising defenses of law. Among the contentions so overruled were the following: that the Regulation is invalid and that an offer of proof of such invalidity should be received (R. 7-12, 14-16, 17-24, 26, 28, 31; *Rottenberg v. United States, supra*, R. 61-67); and that Section 204 (d) of the Act (the "exclusive jurisdiction" provision) is unconstitutional if construed to bar consideration of the validity of the Regulation (R. 13-16, 25-26; *Rottenberg v. United States, supra*, R. 61-67).

The Circuit Court of Appeals, in affirming the conviction, held that Section 204 (d) of the Act operates to bar the attack sought to be made by petitioner against the Regulation; and that Section 204 (d) as so construed, is constitutional (R. 42-56).¹

DISCUSSION

This case presents the same questions respecting the operation and constitutionality of Section 204 (d) of the Emergency Price Control Act—the "exclusive jurisdiction" provisions—as are presented in the companion case of *Rottenberg v. United States, supra*. For the reasons stated in

¹ Petitioner has at no time attempted to obtain administrative or judicial relief in accordance with the available statutory procedures.

the Government's memorandum in that case, we do not oppose the petition in the present case.

Respectfully submitted.

✓
CHARLES FAHY,
Solicitor General.

✓
GEORGE J. BURKE,
General Counsel,
Office of Price Administration.

OCTOBER 1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 374

ALBERT YAKUS, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 375

**BENJAMIN ROTTENBERG AND B. ROTTENBERG, INC.,
PETITIONERS**

v.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (No. 375, R. 59-67) is reported in 48 F. Supp. 913. The opinion of the Circuit Court of Appeals (No. 374, R. 42-56; No. 375, R. 68-82) is reported in 137 F. (2d) 850.

JURISDICTION

The judgments of the Circuit Court of Appeals for the First Circuit in both cases were entered on August 23, 1943 (No. 374, R. 56; No. 375, R. 82). The petitions for writs of certiorari were filed in this Court on September 22, 1943. Certiorari was granted in both cases on November 8, 1943, and the cases were consolidated for argument (No. 374, R. 56; No. 375, R. 83). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204 (d) of the Emergency Price Control Act of 1942 operates to prevent consideration of the validity of maximum price regulations in suits for enforcement of the Act, including criminal prosecutions.

2. Whether Section 204 of the Act, in providing an exclusive procedure for judicial review of maximum price regulations under the Act, and in prohibiting consideration of the validity of such regulations in suits to enforce the Act, contravenes the Fifth and Sixth Amendments of the Federal Constitution or works an unconstitutional legislative interference with the judicial power.

3. Whether, to the extent here involved, the exclusive statutory procedure established in Sec-

tions 203 and 204 of the Act for administrative and judicial review of regulations meets the requirements of procedural due process.

4. Whether the Act involves an unconstitutional delegation of authority to control prices.

STATUTES AND REGULATION INVOLVED

The Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, sec. 901 *et seq.*) will be found in the Appendix. The Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. App., Supp. II, sec. 961 *et seq.*) will also be found in the Appendix. Sec. 7 (b) of the October 2 Act makes applicable the penalties and other provisions of the Price Control Act where authority is delegated to the Price Administrator. For such delegation, see Executive Order 9250, 7 Fed. Reg. 7871, issued October 3, 1942, covering agricultural products and commodities processed therefrom.

Revised Maximum Price Regulation No. 169 is published in 7 Fed. Reg. 10381 *et seq.* The applicable provisions are Sections 1364.451-1364.455, establishing maximum prices for sales of wholesale cuts of beef, and Section 1364.401, prohibiting such sales at prices above the maximum established. The Statement of Considerations accompanying the Regulation will be found in OPA Serv. 41:339 *et seq.*

Revised Procedural Regulation No. 1, issued on November 2, 1942, is published in 7 Fed. Reg. 8961 *et seq.*

Copies of these Regulations and of the Statement of Considerations will be handed to the Court.

STATEMENT

Petitioners in both cases seek review of judgments of the Circuit Court of Appeals for the First Circuit which affirmed judgments of conviction against petitioners in the District Court for the District of Massachusetts (No. 374, R. 12; No. 375, R. 26) under indictments charging sales of wholesale cuts of beef at prices above the maximum legal prices established by Revised Maximum Price Regulation No. 169 (No. 374, R. 1-4; No. 375, R. 1-13).¹ In No. 374, peti-

¹ The indictments against the individual and corporate defendants in No. 375 were consolidated for trial and on the appeal below (No. 375, R. 20, 68). By stipulation (No. 375, R. 57-58) only the pleadings as to the individual defendant were printed in the record for the Circuit Court of Appeals, which is incorporated as part of the present Record. The pleadings as to the corporate defendant are similar to those in the present Record.

The regulation prescribed certain basic prices (called Zone Prices) for the respective grades of beef carcasses and wholesale cuts (sec. 1364.452). From these basic prices certain deductions were required to be made and certain additions were permitted to be added. Of these additions and deductions the only ones material here are those provided for in subdivisions (b) and (c) of section 1364.453 and subdivision (d) of section 1364.454. Originally subdivisions

tioner was found guilty under three counts, and received a concurrent sentence of six months' imprisonment and one thousand dollars fine (No. 374, R. 13). In No. 375, petitioner Benjamin Rottenberg was found guilty under fourteen counts, and received a concurrent sentence of six months' imprisonment and one thousand dollars fine. The corporate defendant-petitioner in No. 375 was found guilty under fifteen counts, and received a concurrent sentence of one thousand dollars fine (No. 375, R. 27, 30).

Petitioners filed pleas of not guilty in the District Court (No. 374, R. 5; No. 375, R. 13-14), but there is no dispute that they were guilty of violations. The District Court overruled a number of motions and requests for rulings raising defenses of law. Among the contentions so

(b) and (c) of section 1364.453 provided that a carload discount of 75 cents per cwt. should be deducted from the basic zone prices on carload sales and that a wholesaler's discount of 50 cents per cwt. should be deducted from the basic prices on less-than-carload sales to wholesalers; subdivision (d) of section 1364.454 provided that wholesalers might add a wholesaler's selling addition of 25 cents per cwt. to the basic prices. In effect, therefore, the regulation allowed wholesalers a margin of \$1.00 per cwt. if they purchased in carload lots and a margin of \$0.75 per cwt. if they purchased in less-than-carload lots.

Subsequent revisions, not here material, were made. By an amendment issued on June 7, 1943 (Amendment 15, 8 Fed. Reg. 7675), the carload and wholesalers' discounts were abolished and a quantity discount varying from 37½¢ per cwt. to 62½¢ per cwt. was substituted. By the same amendment the wholesalers' selling addition was increased from 25 cents to 37½ cents per cwt. On June 24, 1943, the quantity

overruled were the following: that the Regulation is invalid and that an offer of proof of such invalidity should be received (No. 374, R. 7-12, 14-16, 17-24, 26, 28, 31; No. 375, R. 16-20, 23-26, 32-37, 38-41, 42, 61-67);² that Section 204 (d) of the Act (the "exclusive jurisdiction" provision) should not be construed to bar such an assertion of invalidity or an offer of proof thereof (No. 375, R. 37, 50, 62-63); that Section 204 (d) is unconstitutional if construed to bar consideration of the validity of the Regulation (No. 374, R. 13-16, 25-26; No. 375, R. 23, 37, 38, 61-67); and that the Act makes an unconstitutional delegation of power to control prices (No. 374, R. 7,

discount was abolished and the earload and wholesalers' discounts of 75 cents and 50 cents per cwt., respectively, were restored (8 Fed. Reg. 8756). On July 16, 1943, the earload discount was reduced to 25 cents per cwt., the wholesalers' discount was abolished, and the wholesalers' selling addition was increased to 75 cents per cwt. (8 Fed. Reg. 9995), thus again allowing wholesalers a margin of \$1.00 per cwt. if they purchased in earload lots and a margin of \$0.75 if they purchased in less-than-earload lots.

² The defendants challenged the validity of the Regulations by motions to quash and motions in arrest of judgment on the grounds (1) that the Regulation was too vague and indefinite; (2) that it arbitrarily and unreasonably established prices too low; (3) that it failed to fix maximum prices for livestock; (4) that it was not supported by findings sustained by evidence; (5) that it was issued without prior approval of the Secretary of Agriculture; and (6) that it failed to allow a generally fair and equitable margin for processing (No. 374, R. 7-12, 14-16; No. 375, R. 16-20, 23-24). In No. 374 the defendant offered to prove by the testimony of Prentiss M. Brown, then Price Administrator, that the

10, 26, 27; No. 375, R: 15, 16, 18, 19, 38-39, 40, 59-61, 82). In No. 375 the District Court rendered a comprehensive opinion on the issues of law (R. 59-67).

The Circuit Court of Appeals, in affirming the convictions, held that Section 204 (d) of the Act operates to bar the attack sought to be made by petitioners against the Regulation; that Section 204 (d), as so construed, is constitutional; and that the Act does not improperly delegate legislative power to the Administrator of the Office of Price Administration (No. 374, R: 42-56; No. 375, R. 69-82).³

SUMMARY OF ARGUMENT

I

1. The courts below properly held that petitioners could not challenge the validity of the applicable price regulation in this proceeding. Section 204 (d) of the Act expressly provides that the validity of price regulations may be

Regulation failed to allow an equitable margin for the processing of beef (No. 374, R. 18), and that compliance with the Regulation would require defendant to sell his products at prices lower than actual cost (No. 374, R. 19-23). In No. 375 the defendants offered to prove the average cost to wholesalers at Boston of dressed carcasses and wholesale cuts of beef based on the cost of livestock at Chicago and the cost of transporting, handling, and slaughtering, as well as incidental losses and expenses (No. 375, R. 32 *et seq.*).

³ Petitioners have at no time attempted to obtain administrative or judicial relief in accordance with the available statutory procedures. See p. 32, n. 11, *infra*.

considered only in the Emergency Court of Appeals and on review in this Court. The record in such proceedings is formulated by protest or application for adjustment addressed to the Administrator, together with his action thereon. This provision for exclusive review is part of the procedural pattern of the statute, which is designed to protect against the premature interruption and disparate enforcement of wartime inflation control, and which at the same time affords to aggrieved persons an orderly avenue of administrative and judicial review. The protest procedure affords full opportunity to challenge a regulation, with an opportunity to be apprised of data considered by the Administrator and to rebut it. Oral hearings are not precluded where appropriate. The Emergency Court of Appeals has all the powers of a Federal District Court and is in a position to safeguard the interests of complainants.

2. In precluding an attack on the regulation in this proceeding, Congress acted under the war powers to preserve continuity of control and uniformity and expertness of review. The procedure, moreover, is fortified by established principles of administrative law. In criminal proceedings a regulation may not be challenged as invalid where there has been a failure to exhaust administrative remedies (*Bradley v. City*

of *Richmond*, 227 U. S. 477; cf. *United States v. Corrick*, 298 U. S. 435). The principle has been applied, for example, to prosecutions under the Interstate Commerce Act where a person has violated an order or a legal tariff which has not been set aside through resort to the administrative process (*Lehigh Valley R. Co. v. United States*, 188 Fed. 879; *United States v. Vacuum Oil Co.*, 158 Fed. 536). Cases under the Selective Service Act are similar.

3. Special objection has been made to the provisions of the Act which prohibit stays and interlocutory injunctive orders by any court, including the Emergency Court of Appeals. Petitioners have not sought relief by application to the Administrator and may not be in a position to attack the stay provisions. (Cf. *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337.) Moreover, a stay is not a matter of absolute right under the Constitution. (See *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 10.) In the present statute Congress has generalized what would undoubtedly have been proper judicial practice governing the issuance or denial of stays, since that practice gives special weight to the public interests affected. The principle that vital public interests will not be set at naught by the granting of interlocutory relief in

the absence of overwhelming private need finds its most frequent application in cases involving property rights. (See *Phillips v. Commissioner*, 283 U. S. 589, 595, and cases there cited.)

Congress itself in several instances has crystallized a rule against interlocutory injunctive relief. R. S. 3224, in the field of taxation, is essentially this kind of statute. The District of Columbia World War Rent Act and the National Prohibition Act contained provisions against interlocutory relief which were sustained. See *Block v. Hirsh*, 256 U. S. 135, 157-158; *Cywan v. Blair*, 16 F. (2d) 279.

The decision in *Ex parte Young*, 209 U. S. 123, and the cases which have followed it, are not opposed to our position. In the first place, in holding that there was a right to a stay of penalties threatened by criminal prosecutions those cases emphasized the fact that the statutes under consideration provided no method of challenge save by defending in criminal actions, and where violations of the statute would subject the individual to oppressive penalties all effective avenues of redress were blocked. (See *Wadley Southern Railway v. Georgia*, 235 U. S. 651, 662.) In the present Act orderly challenge may be made by administrative protest and judicial review. Moreover, for the most part the cases relied on by petitioners involved the element of continuing

confiscation in relation to public-utility regulation. In the present case there is no constitutional right that regulation under the war powers shall yield a fair return to everyone. Finally, it would be wholly incompatible with the functioning of the price-control law to follow the practice pursued in public-utility cases. The giving of a bond, for example, would not serve to protect against the evils of inflation.

If we are sensitive to the actual perils of inflation, we must look elsewhere for analogies,—for example, to the decisions rejecting claims to preliminary hearings and interlocutory relief where action is taken to control the spread of disease. *Jacobson v. Massachusetts*, 197 U. S. 11, 17-18, 27-28.

It may be observed that in the case of revocation of licenses, not involved here, the statute requires a judicial order and makes provision for stays. (Compare *Porter v. Investors Syndicate*, 286 U. S. 461; *id.*, 287 U. S. 346.)

II

The price control provisions of the statute do not involve an unlawful delegation of legislative power. The standards are fully as definite as those which have been sustained in statutes regulating rates, wages, and prices.

ARGUMENT

I

THE COURTS BELOW PROPERLY BARRED THE ATTACK ON REVISED MAXIMUM PRICE REGULATION NO. 169 IN RECOGNITION OF THE EXPRESS RESTRICTIONS CONTAINED IN SECTION 204 (d) OF THE EMERGENCY PRICE CONTROL ACT

In seeking to challenge the validity of Revised Maximum Price Regulation No. 169 in this proceeding, petitioners have disregarded the statutory procedure provided in the Price Control Act. The validity of that procedure, particularly the limitations in Section 204 (d) of the Act, is here in issue.* Petitioners' contentions respecting Section 204 (d) may be summarized as follows: (1) that the Section does not operate to prevent consideration of the validity of the Regulation in this suit; (2) that if the Section does so operate, it is unconstitutional as a violation of petitioners' rights under the Fifth and Sixth Amendments and as an invasion of the judicial function; and (3) that the statutory procedure for review of regulations;

* The validity of Revised Maximum Price Regulation No. 169 is not before this Court. It is, however, before the Emergency Court of Appeals at the present time. (See, e. g., *Heinz et al. v. Bowles*, No. 102, Em. Ct. App., now pending.)

Petitioners have set out fragments of testimony before a House Committee (Brief in No. 375, pp. 39-42), relating to the position of so-called nonprocessing slaughterers under the Regulation, with special reference to the then absence of a

afforded by Congress as a substitute for the avenues of review barred by Section 204 (d), fails to meet the requirements of procedural due process.

Contentions (1) and (2), *supra*, raise the primary issues in the case; in view of petitioners' failure to try out the available statutory review procedure, it is questionable whether the issues of procedural due process raised under contention (3), *supra*, are properly presented here, save perhaps those which are raised on the face of the statute. (Cf. *Anniston Manufacturing Company*

legal maximum on livestock prices. Petitioners are not in the category discussed, but are wholesale dealers, whose prices are fixed in accordance with margins described in note 1, p. 4, *supra*. The Administrator's position regarding the Regulation is set forth *in extenso* in an opinion dated October 27, 1943, in the Record in the *Heinz* case, *supra* (pp. 55-136), and special reference is there made to the problem of the nonprocessing slaughterers (pp. 76-81). The latter were given an additional payment through Defense Supplies Corporation, by order of the Economic Stabilization Director on October 26, 1943 (*id.* 128-136), conditioned on purchasing livestock within a price range therewith established. The Administrator's opinion states (*id.* 81): "The institution of measures to correct the hardship of which they complain removes the basis for the only substantial objection to the Regulation which has been presented." In a letter to the Attorney General on March 13, 1943, the former Administrator, Prentiss M. Brown, stated that "no evidence which has thus far been brought to my attention establishes that the regulations fixing ceiling prices for meat, if adequately enforced, are inconsistent with the standards of the Emergency Price Control Act or the McKellar Amendment" (*id.* 82-83).

v. Davis, 301 U. S. 337, 354-355; *Hall v. Geiger-Jones Company*, 242 U. S. 539, 554; *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 542, 544-545.) Nevertheless the procedure which petitioners have failed to invoke will be discussed as part of a full description of the statutory plan of exclusive review to which attack is chiefly directed.

A. THE EXCLUSIVE REVIEW PROCEDURE AND THE CONSIDERATIONS IMPELLING ITS ADOPTION

Section 204 (d) of the Act is the keystone of the plan established in Sections 203 and 204 of the Act for administrative reconsideration and judicial review of maximum price and rent regulations issued pursuant to Section 2 of the Act. The Emergency Court of Appeals has been created (Section 204 (c)) as the exclusive judicial forum under this statutory plan, with review by writ of certiorari in this Court. In the interests of maintaining continuity of the price and rent controls while they are thus being judicially tested, however, the Act provides that the Emergency Court shall not issue interlocutory orders and that the regulations shall remain in force until final action by this Court (Sections 204 (c), 204 (d)). By the provisions of Section 204 (d) the exclusive jurisdiction thus vested in the Emergency Court of Appeals and this Court, to be exercised in proceedings instituted under the

statutory procedure, is preserved from infringement by any other tribunal in any other type of proceeding.

In effectuation of this purpose, Section 204 (d) imposes certain limitations upon the jurisdiction of all courts outside the statutory review forum. These limitations may best be understood in terms of a twofold classification of suits arising under the Act: (1) suits to prevent or interfere with enforcement or operation of maximum price and rent regulations, *i. e.*, suits initiated in an attempt to have these wartime controls suspended or set aside, the situation presented in *Lockerty v. Phillips*, 319 U. S. 182; and (2) suits to enforce the regulations under the provisions of Section 205 of the Act, the situation presented in this suit.

In the first class of suits mentioned, the effect of Section 204 (d) is simply that the plaintiff may not have relief except in a proceeding instituted in the Emergency Court of Appeals under Section 204 of the Act. This aspect of the exclusive review plan was upheld in the *Lockerty* case, *supra*. In the second class of suits mentioned, enforcement suits, the applicable language of Section 204 (d) is that the Emergency Court of Appeals, and this Court on review of its judgments, "shall have exclusive jurisdiction to determine the validity" of regulations, and the further provision that no other court "shall have jurisdiction or power to consider the validity" of

regulations. The defendant in an enforcement proceeding is free to raise all proper defenses addressed to the constitutionality of the Act itself as distinct from the regulation involved. The defendant may not, however, raise any defense addressed to the validity of the regulation.

It is evident, we submit, that the court below was correct in its conclusion that the "blanket" statutory language vesting in the statutory review forum "exclusive jurisdiction to determine the validity of any regulation," and depriving all other courts of "jurisdiction or power to consider the validity of any such regulation," plainly comprehends a broader subject matter than a ban against suits initiated by aggrieved persons to enjoin or set aside price controls; the language cited operates to bar consideration of the validity of a particular regulation "however the litigation may originate." As the court below also recognized, the legislative history confirms this construction (No. 375, R. 75-76). Petitioners' contention that Section 204 (d) is not to be construed as barring an attack on the Regulation in this suit is plainly in error.⁵ The suggestion that

⁵ It is true that, in an analytical sense, it may be difficult to dissociate an attack, or a decision, directed at the validity of the statute from one directed at the validity of a regulation; since the statute impinges on the party involved through the regulation. Nevertheless the distinction has been drawn by Congress, and it is practicable to give it effect. (Cf. *Jameson & Co. v. Morgenthau*, 307 U. S. 171; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282.) The Senate Com-

the Regulation was not "issued under" Section 2 of the Price Control Act (Brief in No. 375, p. 3) is answered not only by the recital in the Regulation that it was issued under both that Act and the Act of October 2, 1942, but also by the provision in Section 7 (b) of the October 2 Act making applicable the provisions of the earlier Act where authority is delegated to the Administrator by the President, as was done here (see Executive Order 9250, 7 Fed. Reg. 7871).

The statute and procedural regulations which have been issued pursuant to it (Revised Proce-

mittee on Banking and Currency, in favorably reporting the bill which contained the provisions of Section 204 (d), stated (S. Rep. 931, 77th Cong., 2d sess., p. 25) :

"* * * Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. *Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.*" [Italics supplied.]

The bill thus reported to the Senate, whose pertinent provisions were adopted, differed significantly from the bill as introduced in the House; in its original form Section 204 (d) provided: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any ceiling regulation or order, *and of the provisions of this Act authorizing such regulation or order.*" [Italics supplied.] H. R. 5479, 77th Cong., 1st sess., printed in Hearings before Committee on Banking and Currency, House of Rep., 77th Cong., 2d sess., on H. R. 5479, pp. 4, 7-8. See also the decision of the three-judge Federal

dural Regulation No. 1)⁶ afford to aggrieved persons full opportunities for administrative and judi-

District Court in *Lockerty v. Phillips*, 49 F. Supp. 513, affd., 319 U. S. 182, where Circuit Judge Maris (a member of the bench of the Emergency Court of Appeals) stated for the court (p. 514):

"The portion of section 204 (d) which we are considering deprives the courts of the country, other than the Emergency Court of Appeals, merely of jurisdiction and power to 'stay, enjoin, or set aside * * *'. These words refer to the type of affirmative relief sought to be obtained from a court, the type being injunctive in its nature; they do not indicate or imply that a court may not consider the constitutionality of the act if that question arises incidentally in a criminal prosecution or civil suit. For example, we think it is clear that in a criminal prosecution or in a civil suit brought by the Price Administrator for an injunction to restrain a violation of the act or of a regulation issued thereunder section 204 (d) does not deprive the court of power to consider a defense based upon the alleged [un]constitutionality of the act. When Congress desired to prohibit courts from considering the question of validity under any circumstances it knew how to do so by the use of appropriate language for in the very sentence which we are considering it deprives all courts except the Emergency Court of Appeals of power 'to consider the validity of any such regulation, order, or price schedule' but it does not here or elsewhere in terms prohibit the courts from considering the validity of the act itself."

⁶The Price Control Act (Sec. 2 (c)) authorizes the Administrator to incorporate into maximum price regulations provisions "for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act." (Cf. *Lakemore Company v. Brown*, 137 F. (2d) 355 (E. C. A., 1943); *Hillcrest Terrace Corporation v. Brown*, 137 F. (2d) 663 (E. C. A., 1943); *Armour and Co. v. Brown*, E. C. A., Aug. 6, 1943, OPA Service 610:59.) While Revised Maximum Price Regulation 169 does not contain a general provision for individual adjustments, section 1364.410 provides for petitions for amendment, and in fact amendments have been made from time to time. See, e. g., note 1, p. 4, *supra*.

cial relief. Under Revised Procedural Regulation No. 1 two types of administrative relief were available to petitioners herein: (1) a "protest" against Maximum Price Regulation No. 169 or any provision thereof (Act, Sec. 203; Proced. Reg., Subpart D); and, (2) a "petition for amendment" of the Regulation or any provision thereof (Proced. Reg., Subpart C), the latter being an additional remedy afforded by the Administrator and not required by the Act addressed to the Administrator's "legislative" discretion. (See *Bogart Packing Co., Inc., v. Brown*, E. C. A., Oct. 19, 1943, OPA Service 610: 84.)

The statutory "protest" is required to be filed within sixty days from the date of issuance of the aggrieving regulation or may be filed upon "new

The contention that preissuance hearings are constitutionally required is answered by many cases dealing with administrative rule-making affecting a large group, where practical considerations and the inherent guaranty of fairness in such general action are decisive; see *Bi-Metallic Co. v. Colorado*, 239 U. S. 441. In emergency situations the answer is especially strong. See *Jacobson v. Massachusetts*, 197 U. S. 11; *Phillips v. Commissioner*, 283 U. S. 589, 595. In *Opp Cotton Mills v. Administrator*, 312 U. S. 126, the statute required preissuance hearings, and unless such hearings were held there would have been no opportunity for a hearing, since the record on review was limited to the record made before the Administrator. The Emergency Court of Appeals has sustained the procedure in respect of hearings. *Avant v. Bowles*, No. 63, decided December 31, 1943. It may be observed that Revised Procedural Regulation No. 1 makes provision for preissuance hearings in suitable cases (Secs. 1300.3-1300.5).

grounds" within sixty days from the date when the protestant had or might reasonably have had notice of such new grounds (Act, Sec. 203 (a); *Proced. Reg.*, Sec. 1300.26). Petitioners complain that this limitation period affords inadequate time. The Act specifically provides that the Administrator may permit the presentation of evidence after the filing date (Sec. 203 (a)). Revised Procedural Regulation No. 1 contains detailed provisions in aid of protestants so circumstanced that they require additional time for presentation of evidence (Secs. 1300.30 (c), 1300.33 (b)). A sixty-day limitation period is more than a reasonable time in which to decide upon entry into an administrative forum. In *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 153, this Court held forty days to be ample notice of a hearing for establishment of minimum wages under the Fair Labor Standards Act. The Court has held much shorter periods to be reasonable (*Wick v. Chelan Elec. Co.*, 280 U. S. 108 (18 days between first day of publication and return in condemnation); *Bellingham Bay, etc., Co. v. New Whatcom*, 172 U. S. 314 (10 days within which to file objection to notice of reassessment) cf. *Campbell v. Olney*, 262 U. S. 352 (20 days within which to sue to set aside assessment)). The Congressional adoption of a sixty-day, rather than a longer, period for protest is fully justified under the present circumstances.

These wartime regulations and orders affect millions of persons. It is of the utmost importance that necessary or desirable changes be brought to the Administrator's attention with the greatest possible dispatch. It would be difficult to justify a longer period (*Harlem Metal Corp. v. Brown*, 136 F. (2d) 242 (E. C. A. 1943); *Bogart Packing Co., Inc. v. Brown*, E. C. A. Oct. 19, 1943, OPA Service 610:84; *Taylor v. Brown*, 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term.

In passing upon protests the Administrator is governed by the provisions of Section 203 of the Act. He is required to dispose of protests with reasonable dispatch; he is subject in this regard to corrective order by writ of mandamus from the Emergency Court of Appeals (*Safeway Stores, Inc. v. Brown*, 138 F. (2d) 278 (E. C. A. 1943)). Protestants may file documentary matter, and the implementing procedural regulation makes full provision for oral hearings (Secs. 1300.39-1300.42) and for the issuance of subpoenas at a protestant's request in proper cases (Sec. 1300.44). The Administrator must advise the protestant of the grounds upon which denial of a protest is based, and of any economic data and other facts of which he has taken official notice (Act, sec. 203 (a)).

The jurisdiction of the Emergency Court of Appeals attaches upon the filing of a complaint

in that court. The statute requires (Sec. 204 (a)) that in preparing the transcript for the Emergency Court the Administrator shall include such matter as is "material under the complaint." It is the complainant, therefore, who controls and shapes the issues in the Emergency Court. The provision (Sec. 204 (a)) that facts of which the Administrator has taken official notice shall be included in the transcript "so far as practicable" is not a peril to the complainant. Rule 15 (d) of the Emergency Court of Appeals specifically provides for "correction of the transcript." The complainant is in a position to decide advisedly whether to invoke this rule since he will have been informed by the Administrator of the data on which the order of denial is based (p. 20, *supra*). These safeguards, together with the provisions respecting introduction of new evidence in the Emergency Court of Appeals (Act, Sec. 204 (a)), ensure that persons entering the statutory forum will receive full opportunity for appraisal and rebuttal at all stages of the review process.*

* With respect to oral hearings, the statute permits, but does not require, the Administrator to limit protest proceedings to the filing of affidavits, or other written evidence, and the filing of briefs. Revised Procedural Regulation No. 1 (Sec. 1300.39 *et seq.*) provides for the granting of oral hearings where the protestant shows that "affidavits or other written evidence and briefs will not permit the fair and expeditious disposition of the protest." In view of the nature of the issues, written evidence, with appraisal of any countervailing

This Court has already had occasion to observe the practical operation of the statutory review procedure (E. g., *Davies Warehouse Co. v. Brown*, 137 F. (2d) 201 (E. C. A. 1943), certiorari granted, No. 112, present Term; *Taylor v. Brown*, 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term). The Emergency Court of Appeals is endowed by the statute with powers sufficiently broad to assure aggrieved persons of the fullest judicial consideration and the fullest opportunity for judicial relief (*Taylor v. Brown*, *supra*; *Wilson v. Brown*, 137 F. (2d) 348 (E. C. A. 1943); *Armour and Co. v. Brown*, E. C. A., August 6, 1943, OPA Serv. 610:59; *Hillcrest Terrace Corporation v. Brown*, 137 F. (2d) 663 (E. C. A. 1943)). The Emergency Court possesses authority to set aside any regulation which is shown to be "not in accordance with law, or * * * arbitrary or capricious" (Section 204 (b)). It also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself. (See p. 16, *supra*.) And it may exercise its corrective powers to prevent procedural abuses by the Administrator or to remand for correction. (See *Safeway* data and an opportunity to rebut it, will ordinarily be adequate. Administrative proceedings confined to written evidence and briefs are familiar practice. (See Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st sess., pp. 404-410; *United States v. Abilene & So. Ry.*, 265 U. S. 274, 289.)

Stores, Inc. v. Brown, supra; Act, Sec. 204 (b).) The Emergency Court of Appeals exercises the judicial power of the United States in reviewing the Administrator's determinations. Except for the restrictions as to issuance of interlocutory orders, it exercises the full powers of a district court of the United States, with respect to the jurisdiction conferred by the Act (Section 204 (c)). The plan of administrative and judicial review established in Sections 203 and 204 of the Act has been held, in its various aspects, to satisfy the requirements of due process. (E. g., *Lockerty v. Phillips*, 319 U. S. 182; *Avant v. Bowles*, E. C. A. Dec. 31, 1943, not yet reported; *Taylor v. Brown, supra*; *Montgomery Ward & Co. v. Bowles*, E. C. A., November 5, 1943, OPA Serv. 610:87; *Lakemore Company v. Brown*, 137 F. (2d) 355 (E. C. A. 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942)).

Directly in issue in the present case is the provision of Section 204 (d) forbidding any court outside the exclusive statutory forum to consider the validity of maximum price regulations. This provision operates in protective combination with the jurisdictional restriction (Sec. 204 (d)) sustained in *Lockerty v. Phillips, supra*, and with the provisions which bar interlocutory relief in the Emergency Court of Appeals (Sec. 204 (c)) and preserve the regulations in force pending review by this Court (Section 204 (b)). These provisions are parts of a unified statutory plan.

They are designed to safeguard the nation against the perils which inhere in delay, premature interruption, or nonuniform application of inflation controls in wartime. Before considering the precedents which support their validity, we shall recount briefly the considerations which impelled their enactment and which demonstrate their function in the control of wartime inflation.

The need for continuity of control.—There will be no challenge, we are confident, of the judgment embodied in the Emergency Price Control Act that effective control of price inflation is a matter of the most urgent necessity for a nation at war today.⁹ Effective control is difficult in part because the incidents of price inflation are, as manifold and as widespread as the business transactions which take place each day in the economic life of a large industrial nation. The chief difficulty arises, however, from the cumulative and irremediable character of price inflation. An inflationary incident is virtually impossible to undo, because its consequences are rapid and pervasive. The only effective way to control inflation with respect to particular commodities is to control it uniformly, without delay, and without interruption.

If adverse adjudications—preliminary or final injunctions or other paralyzing orders—interfer-

⁹ See Message of the President, July 30, 1941, 85 Cong. Rec. 6457, H. Rept. 1409, 77th Cong., 1st Sess.

ing with the present controls could be secured in various judicial districts throughout the country, and if premature relief could be secured in the statutory forum, the purposes of the Emergency Price Control Act would be nullified. In the case of criminal proceedings, any opportunity for appeal by the Government would depend on whether the adverse decision of the trial court fell within the categories covered by the Criminal Appeals Act (18 U. S. C. § 682). Persons or localities benefiting by such adjudications in the regularly established courts of the country would be freed from the obligation to comply with regulations while others still had to obey. Such inequality in the operation of the statute would naturally create a sense of injustice in the community, would militate against popular acceptance of the statute, and would make its proper enforcement more difficult. More than this, however, such uneven and haphazard operation of the statute would carry a threat of serious damage to the domestic economy. The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the areas in which higher prices prevailed. Purchasers in lower-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would

be the more acute because of wartime shortages in many commodities.

Similarly, premature orders in the statutory forum itself, suspending the effectiveness of regulations throughout the country in advance of a final decision on their validity, would defeat expeditious and fair methods of regulation. If a price regulation did not have to be obeyed during the period between its original promulgation and final judicial determination of its validity, many persons would find it more profitable to make the fullest use of the law's delays rather than to take advantage of the opportunities provided by the statute for a speedy decision. The consequences of any prolonged suspension of regulations might be disastrous and would be irrevocable.

It is evident, then, that control of price inflation in wartime, perhaps unlike other kinds of governmental regulatory action, cannot accomplish its purpose unless it is effective from the very outset and continues to be effective while normal administrative remedies are being applied and the fullest judicial consideration of the program is being completed. No bond or deposit in court could safeguard the incalculable values both public and private which are at stake when inflationary controls are challenged in wartime. No price can be placed upon military need and national morale. Congress recognized in this Act that the national safety demands continuity of

price control until, in pursuance of an orderly course of proceedings, the decision of the highest court of the land has been had upon the questions of law involved.

The need for a simplified enforcement mechanism and for expert review.—The need for simplified enforcement in aid of wartime price controls is apparent. Maximum price regulations affect millions of persons. Unless effective enforcement measures are available, a price-control program cannot long proceed successfully. If, in every suit to enforce compliance with the regulations, the Government were under an obligation to present the mass of economic data which might be required to establish the validity of the regulation, and to meet the evidence and arguments which might be presented by each defendant, the already great difficulties of enforcement might well become insuperable. Congress in adopting the review provisions of this Act had before it the discouraging history of delay in the litigation of public utility rate cases. (See Mr. Justice Brandeis, concurring, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, at 84-88; Mr. Justice Black, dissenting, in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 435-436.) The technical and complex economic questions involved in challenges to the validity of price regulations have accordingly been reserved by Congress for consideration in

orderly proceedings before a specially constituted tribunal which can act on a proper administrative record, can develop the essential expertise for a fair, well advised, and expeditious appraisal of the regulations, and can build up the necessary uniformity in standards of review. The Emergency Court of Appeals thus enjoys the advantage of a continuous and concentrated experience in disposing of these important controversies. It can render its decisions upon a comprehensively informed basis and with proper recognition of national aspects.

The need for administrative flexibility.—Thousands of persons are often affected by the establishment of a single price ceiling. Careful investigation prior to the issuance of a regulation will have brought the general economic considerations to the attention of the Administrator. No amount of preliminary economic survey, however, can bring to the attention of the Administrator all of the significant facts in the situation and all of the ways in which the regulation will affect the persons subject to it. The unique problems of particular business units can only be known if they bring their cases to the attention of the Administrator and advise him of the facts. Often there is no occasion for controversy between persons subject to a regulation and the Administrator, but merely the need for an opportunity to present significant and relevant facts to the Ad-

ministrator. Precision in adjustment or modification of a regulation is only possible within the framework of the administrative processes. The agency which establishes the regulation is in the best position to make a thorough and complete reexamination of the considerations which led to the issuance of the regulation in its original form.

In contrast with the flexibility of the administrative remedy is initial judicial determination of the validity of a maximum price regulation. A court in passing upon the validity of a particular regulation would be limited to a finding that it is either valid or invalid. It could not make the adjustments or modifications appropriate for a particular case. If a maximum price of twenty-four dollars per cwt. is judicially determined to be invalid, the result would not be that a maximum of twenty-five dollars would be substituted; the seller would be free to sell at any price the traffic would bear. Instead of flexible but secure control of prices the result would be absolute release of control for a period.

That the considerations outlined above dictated the adoption of these provisions by Congress is amply shown by the legislative history of the provisions, as set forth in the accompanying footnote.¹⁰

¹⁰ The following excerpts are from the report of the Senate Banking and Currency Committee, recommending adoption

The instant suit illustrates the needs which Congress had in view when it passed this Act. Established metropolitan wholesale dealers in meat, a food not less scarce than vital in the

of the provisions (77th Cong., 2d Sess., S. Rep. No. 931, pp. 23, 24-25) :

"* * * In keeping with the emergency character of the regulations and orders of the Administrator issued under section 2 of the bill, and to expedite action affecting the validity of such regulations or orders without overburdening the regular courts and judges, exclusive jurisdiction to determine the validity of any such regulation or order is vested in an Emergency Court of Appeals created under Section 204 (c) of the bill, and upon review of judgments or orders of such Emergency Court, in the Supreme Court of the United States. * * *

"The Emergency Court of Appeals is given exclusive jurisdiction to set aside, in whole or in part, any regulation or order under section 2, to dismiss the complaint, or to remand the proceedings, and all the powers of a district court are conferred upon it with respect to this jurisdiction, except the power to issue interlocutory orders staying the effectiveness of any such regulation or order.

"The bill contains provisions necessary to insure that price control administration will not be paralyzed by preliminary injunctions, interlocutory restraining orders, or stays. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court, are granted exclusive jurisdiction under section 204 (d) to determine the validity of any regulation or order issued under section 2 or of any price schedule effective under the provisions of section 206. If the judgment of the Emergency Court is to enjoin or set aside, in whole or in part, any such regulation or order, the effectiveness of such judgment is postponed under section 204 (b) until after 30 days from the entry thereof. This 30-day period is necessary in order to prevent

present emergency, are dissatisfied with the maximum price regulation applicable to their business. Under the statute methods are provided whereby these objections could be disposed of in an orderly manner without violent dislocations—without subjecting the public to the hardships of a reduced supply of meat or excessive meat prices, and without involving the dissatisfied meat dealers in prosecutions for breaking the law. The dealers, however, have not pursued their statutory remedy and have invited criminal prosecutions by violat-

prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction,

ing the price regulation." Finally, they have attempted to thwart these prosecutions by invoking a forbidden judicial authority below to have the entire meat regulation declared invalid. Thus, petitioners, having chosen to forego their statutory remedy, now ask that this Court order the trial court and the Government to undertake a task which could be terminated with reasonable

concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

The following excerpt from the hearings on the bill is also pertinent:

"Mr. GINSBURG. The bill [as originally passed by the House] further omits provisions with regard to a stay. In our bill—and I believe in the bill proposed by Senator Taft—the price remains in effect while it is being reviewed by the courts. The idea is that if the price could be stayed while it is being reviewed by the courts, there would be no possibility of price control in the interval.

"The House bill omits the stay provision. It permits diversity of decision and review by 11 different courts. In some circuits the price could go up because the price fixed by the Administrator or the Board is no longer in effect; in other circuits, where there have not been any appeals, the price would remain fixed.

"Senator TAFT. There should be no stays" (Hearings before the Committee on Banking and Currency, Senate, 77th Cong., 1st Sess., H. R. 5990, pp. 146, 147).

¹¹ The initial statutory 60-day period provided in section 203 (a) for filing of protests against Revised Maximum Price Regulation No. 169, (7 F. R. 10381), expired on February 8, 1943. The indictments against petitioners were handed down on February 24, 1943. Petitioners have not attempted to file protests on new grounds arising after the initial 60-day period, as they are entitled to do under section 203 (a) upon a proper showing that such new grounds have in fact arisen. (See p. 19, *supra*.)

promptness only at the expense of thoroughness and accuracy, which could be performed with even so much as a minimum regard for the complex problems involved only at the expense of expeditious and efficient enforcement, and which in no event would be aided by the necessary underlying administrative record.

If the events described should establish a model for other persons subject to maximum price regulations the price control program would collapse. The provisions of the Act which provide for exclusive jurisdiction and prevent the issuance of premature stays are intended to avert this danger and at the same time afford to aggrieved persons an appropriate avenue of relief.

B. THE PROVISION WHICH BARS CONSIDERATION OF THE VALIDITY OF MAXIMUM PRICE REGULATIONS IN SUITS TO ENFORCE THE ACT AND GRANTS EXCLUSIVE AUTHORITY IN THAT REGARD TO THE EMERGENCY COURT OF APPEALS IS CONSTITUTIONAL

We have previously shown (pp. 23-32, *supra*) that a restriction against consideration of the validity of the regulations had to be imposed in proceedings to enforce the regulations as a necessary corollary of the grant of exclusive jurisdiction to the Emergency Court of Appeals and this Court. This provision of Section 204 (d), like the bar against injunctions in the district courts, is designed to ensure that the exclusive purview reserved to the statutory forum will not be infringed by other courts. The pro-

vision constitutes a recognition by Congress of the need for uniform application and proper enforcement of wartime price controls. The provision fulfills this need, as has been seen, by ensuring well-advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in determining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.

Thus, the statutory ban against inquiry respecting the validity of regulations in enforcement suits is an integral part of a statutory plan adopted in furtherance of vital wartime objectives. This provision of the Act rests, therefore, like the other features of the exclusive review plan attacked by petitioners, primarily on the war powers of Congress. In exercising these powers for the control of prices in wartime, the choice of measures and procedures to make that control effective is a necessary part of the Congressional authority. The war power of the Federal Government "is a power to wage war successfully" (*Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 426; see also *Stewart v. Kahn*, 11 Wall. 493, 506; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 163).

The constitutionality of the provision forbidding consideration of the validity of price regulations in enforcement suits is fortified by established principles of administrative law. Even in the absence of section 204 (d) petitioners would probably not have the right to challenge the regulation in the proceedings below. Petitioners would be prevented from challenging the regulation as a normal consequence of their failure to exhaust their administrative remedies. In specifically compelling the same result, therefore, the Act has not deprived petitioners of any rights they might otherwise have had. And certainly they have not been denied due process of law. The numerous generalizations quoted by petitioners (Brief in No. 375, pp. 35-39) to the effect that the validity of official action may be challenged by way of defense, deal with situations where other recourse was not available; they do not reach the issue presented here.

Any objection against the validity of the regulation is available if raised in the appropriate manner and at the proper time. The essential purpose of the rule requiring exhaustion of administrative remedies before resort to the courts—which Mr. Justice Brandeis described in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, as a “rule of judicial administration”—is to allow the administrative body which promulgated the regulation an opportunity to consider ob-

jections to it and if necessary modify it upon full consideration of the relevant facts, accommodating the relief to the needs of the particular case. That rule, together with the rule preventing collateral attack upon administrative determinations, makes an administrative enactment unassailable in proceedings instituted to enforce it.

Thus, in *Bradley v. City of Richmond*, 227 U. S. 477, a defendant in a criminal prosecution for violation of an ordinance requiring private bankers to obtain licenses was held barred from challenging his administrative classification because of his failure to appear before the classifying agency. No statute required the Court to refrain from considering the validity of the administrative action; yet the Court ruled that, because the procedure established by the statute which might have afforded relief was not pursued, invalidity even on constitutional grounds could not be urged as a defense in a criminal proceeding. This Court said (p. 485):

The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was

committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under these circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council. * * *

In *United States v. Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y. 1908) the court upheld the constitutionality of the Elkins Act (Act of Feb. 19, 1903, c. 708, sec. 1, 32 Stat. 847, 49 U. S. C. 41), which was construed to deprive a shipper of the right to contest the reasonableness of the carrier's filed rate in defending against a criminal prosecution for receiving rebates.¹² The shipper was

¹² The court said (p. 540) :

"* * * That Congress had power under the commerce clause of the Constitution to regulate commerce is conceded, and its purpose in enacting the statute forbidding unjust discrimination and preference to the end that all shippers shall secure uniform treatment is beyond question. How this object and purpose of Congress can be effectuated if a shipper receiving rebate, concession, or discrimination is permitted to question or litigate the legality of the rate as to its reasonableness or unreasonableness in a criminal prosecution charging him with having received a concession is difficult to understand. Indeed such a construction of the act would nullify its general scope, and render its strict enforcement wholly impracticable, for juries and judges in different

bound to obey the filed rate until set aside by the Commission as unlawful, though he had not set the rate and insisted it was unreasonable. The same statute was involved in *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3d, 1911), a criminal prosecution for improperly cancelling demurrage charges. The defense that the demurrage rates set up by the Interstate Commerce Commission were discriminatory was held unavailable in a criminal prosecution, since the validity of the rate could be questioned only in an administrative proceeding before the Commission. These cases are sought to be distinguished by petitioner (Brief in No. 375, p. 57) on the ground that the Interstate Commerce Commission is an older agency than the Office of Price Administration—a distinction which, all else aside, is hardly of constitutional stature.

The similar situation in cases under the Selective Service Act—holding that in a prosecution for failure to report for induction the defendant may not litigate the alleged arbitrariness or invalidity of his classification as determined by the Local Board—has been presented

jurisdictions would not be likely to reach a conclusion upon the subject of just or unjust tariff charges which would secure uniformity of rates. It is therefore clear that there can be no departure or deviation from the established rates except in the manner provided by the act, and such rate must be regarded as binding upon the shipper * * *

to the Court in *Falbo v. United States*, No. 73, present Term.

The rule thus forbidding collateral attack on administrative orders in criminal proceedings has, of course, likewise been applied in other types of enforcement suits. The principle requiring exhaustion of administrative remedies has equally compelling force in both civil and criminal suits. Only the method outlined in the statute for testing the validity of an administrative order may be used. Unless and until the order has been set aside in direct proceedings to challenge it, it must be observed and compliance will be enforced. This result is reached although no statute expressly commands it, and a statute which does command it is undoubtedly constitutional (*American Bond & Mortgage Co. v. United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374; *United States v. Piuma*, 40 F. Supp. 119 (S. D. Cal. 1941), affirmed, 126 F. (2d) 601 (C. C. A. 9th, 1942); *Interstate Commerce Commission v. Consolidated Freightways*, 41 F. Supp. 651 (D. N. D. 1941). Cf. *Ingraham v. Union Stock Yards Co.*, 64 F. (2d) 390 (C. C. A. 8th, 1933); *Forbes v. United States*, 125 F. (2d) 404 (C. C. A. 9th, 1942); *United States v. R. L. Dixon and Bro.*, 36 F. Supp. 147 (N. D. Tex. 1940); *United States v. Hawthorne*, 31 F. Supp. 827 (N. D. Tex. 1940), affirmed on other grounds, 115 F. (2d) 805 (C. C. A. 5th, 1940); *Harris v. Cen-*

tral Nebraska Public Power & Irr. Dist., 29 F. Supp. 425 (D. Neb. 1938)).¹²

This Court has declared that where rates have been established by an administrative agency, they may be challenged only in the manner prescribed by statute and that other courts may not prevent the agency from prosecuting violators (*United States v. Corrick*, 298 U. S. 435). In that case operators of market agencies sought to file higher rates than those prescribed by the Secretary of Agriculture for market services under the Packers and Stockyards Act of 1921, 7 U. S. C., secs. 181-229, and to restrain the Secretary from prosecuting them for charging the higher rates. Dismissing the bill, this Court said (p. 440):

The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees; and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secre-

¹² To the same effect are numerous State court decisions. *Town of Pittsfield v. Town of Exeter*, 69 N. H. 336, 41 Atl. 82 (1898); *Town of Rockingham v. Hood ex rel. Bank of Peelee*, 204 N. C. 618, 169 S. E. 191 (1933); *Fitt v. Central Illinois Public Service Co.*, 273 Ill. 617, 113 N. E. 155 (1916); *Friedman Mfg. Co. v. Industrial Commission*, 284 Ill. 554, 120 N. E. 460 (1918); *St. Louis Pressed Steel Co. v. Schorr*, 303 Ill. 476, 135 N. E. 766 (1922); *People ex rel. Brittain v. Outwater*, 360 Ill. 621, 196 N. E. 835 (1935); *People ex rel. McDonough v. Beemsterboer*, 356 Ill. 432, 190 N. E. 920 (1934), certiorari denied, 293 U. S. 575; rehearing denied, 293 U. S. 630.

tary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

It is recognized in the foregoing cases that, where the statutory review procedure has not been pursued, a defense based upon the alleged invalidity of administrative action is as inadmissible as the institution of a suit to enjoin enforcement. (Cf. *Lockerty v. Phillips*, 319 U. S. 182.) See the cases upholding Section 204 (d) in enforcement suits, cited in our Memorandum on petition for certiorari in No. 375, at p. 6.

Petitioners in choosing to disregard the available statutory methods of review and to subject themselves to criminal prosecution by violating the regulation have made that choice knowing in advance that they would not be permitted to challenge the violated regulation in the criminal suits. Congress has accorded to petitioners ready access to a proper forum in which all objections to a regulation may be presented and fully considered. Their right to challenge an allegedly invalid regulation has not been abridged. The only restrictions placed on their rights in this respect are (1) the customary requirement, enforced by the courts themselves even in the absence of statute, that objections to any administrative order first be brought to the attention of the administrative agency; (2) the requirement, traditionally ob-

served under statutes of this type, that where a statutory judicial forum is provided and designated as exclusive, objections to an administrative order shall be presented in such forum; and (3) the indispensable wartime enforcement of obedience to price controls pending completion of review proceedings (see pp. 13-16, 23-32, *supra*, 42-60, *infra*).

There is no merit in petitioners' contention that the Act violates their right under the Sixth Amendment to a jury trial. The issue of the validity of the regulation need not be settled by jury trial. (Cf. *Block v. Hirsh*, 256 U. S. 135, 158.) This Act does not trench upon any right guaranteed to petitioners by the Sixth Amendment.¹⁴

Finally, it is submitted that the considerations and authorities presented above are sufficient to dispose of petitioners' contention that the provision barring consideration of the validity of regulations in enforcement suits is an unlawful abridgment of the judicial power.¹⁵

¹⁴ It may be observed that if the objection is addressed to the need to come to Washington to appear before the Emergency Court of Appeals, the rules of that Court specifically provide that it may sit anywhere. Rule 4 (a), Rules of the United States Emergency Court of Appeals.

¹⁵ *United States v. Klein*, 13 Wall. 128, is not opposed. The statute there prescribed an arbitrary rule for the judicial determination of a question of fact, and in addition it thwarted the executive power of pardon.

C. THE PROVISIONS WHICH PROHIBIT STAYS AND INTERLOCUTORY INJUNCTIVE ORDERS FOR THE PURPOSE OF MAINTAINING CONTINUITY OF PRICE CONTROL PENDING COMPLETION OF STATUTORY REVIEW PROCEEDINGS ARE CONSTITUTIONAL

In addition to complaining of the provision which channels attacks on the regulations in the exclusive statutory forum, petitioners complain of the accompanying provision denying stays in the statutory forum (sections 204 (b), 204 (c)). Attack is thus made upon the provisions of the Act which insure the continuity necessary for success of the present wartime price controls.

The provisions assailed are an indispensable part of a statute which rests on the war powers of Congress. We have pointed out above (see pages 23-32, *Supra*) that these provisions are essential because the principal difficulty in dealing effectively with wartime price inflation arises from its "runaway" or "spiral" character. Delayed or interrupted control is futile. The harm done to the public interest by a release of control could not be guarded against by any bond or deposit. Petitioners' assertion that they suffer loss under this statute cannot outweigh the overwhelming considerations on the side of the public. The validity of the denial of stays in this Act rests, then, primarily upon the war powers of Congress. Further, however, it is submitted (1) that petitioners cannot attack the stay provisions because

they have not been injured by them; and (2) that there is no constitutional right to a stay.

1. Petitioners Have Not Been Injured by the Stay Provisions

Petitioners have not been injured by the provisions of the statute which preserve the continuity of price regulations in the statutory forum, because they have not gone into the administrative forum provided in section 203 of the Act and in the implementing regulations. By applying for administrative reconsideration petitioners might have obtained complete relief in the form of a substantive order or amendment which would have been the equivalent of a stay. There would then have been no need for a judicial stay or for the present controversy on this point.

It is well established that persons may not challenge a statutory procedure which they have declined to pursue and whose untried incidents cannot properly form the subject of collateral inquiry or attack. (See the cases cited at p. 13, *supra*.) Before petitioners can complain that they are hurt by the provisions of the statute denying them judicial stays, they are under a duty to show that they have made an effort under the statutory procedure to obtain administrative relief which might have obviated the need for such a stay.

2. *A Stay is not a Matter of Absolute Right Under the Constitution*

As this Court recently had occasion to declare in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, there is no absolute right to a stay pending judicial review of legislative or administrative enactments; the right to such a stay is never recognized where the public interest demands otherwise. The Court said (p. 10):

A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant (*In re Haberman Manufacturing Co.*, 147 U. S. 525). It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case (*Virginian Ry. Co. v. United States*, 272 U. S. 658, 672-73; * * *).

The question before the Court in that case was whether Congress intended to authorize stays in a certain class of proceedings for judicial review of orders of the Federal Communications Commission. The statute was construed as authorizing stays. Neither the majority nor the dissenting opinion treated the question on any level save that of Congressional intention. In the case at bar the answer is not in doubt. This Court indicated the answer when, in the *Scripps-Howard* case, it adverted to the present Act and declared

that Congress "knew how to use apt words" (316 U. S. at 17) to express its command that the present wartime price controls shall remain immune against judicial stays.

The recognition in the *Scripps-Howard* case that stays are not a matter of absolute right and may be subject to Congressional control in the public interest is in accord with the well-established principle that the courts themselves do not permit stays in situations involving some object of paramount public concern. The rule traditionally followed in such cases is that the "balance of convenience" between the parties must condition the granting of a stay. Frequently granted in suits between private parties, stays even in that class of suits are not absolutely assured because the right is qualified by two conditions; first, it must appear that the rights of the party to be aided will suffer heavily if relief is denied; but, second, it must also appear that the rights of the party to be enjoined will not be seriously injured in the meantime or can be protected by the posting of financial security. That the first of these conditions is met is not enough; the second must also be met.¹⁶

¹⁶ In the following private litigation relief was denied under this rule: *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767 (C. C. A. 8th, 1911); *Shubert v. Woodward*, 167 Fed. 47 (C. C. A. 8th, 1909); *Green v. Gravatt*, 19 F. Supp. 87 (W. D. Pa. 1937); *International Film Service Co. v. Associated Producers*, 273 Fed. 585 (S. D. N. Y. 1921); *DeKoven v. Lake*

When a suit between private parties is one involving a matter seriously affecting the public interest,¹⁷ and, *a fortiori*, when a governmental entity or agency is directly involved as a party in a suit, this rule achieves the status of a virtual bar against stays.¹⁸ (See *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 338.) If a stay is granted in such a suit against a public agency, it is strictly

Shore & M. S. Ry. Co., 216 Fed. 955 (S. D. N. Y. 1914); *Napier v. Westerhoff*, 138 Fed. 420 (C. C. S. D. N. Y. 1905); *Gring v. Chesapeake & Delaware Canal Co.*, 129 Fed. 996 (C. C. Del. 1904), affirmed, 159 Fed. 662 (C. C. A. 4th, 1908), certiorari denied, 212 U. S. 571; *Amelia Milling Co. v. Tennessee Coal, Iron & R. Co.*, 123 Fed. 811 (C. C. N. D. Ga. 1903); *Day v. Candeē*, Fed. Cas. 3676 (C. C. Conn. 1853). In the following private cases relief was given under the rule: *Selchow & Righter Co. v. Western Printing & Lithographing Co.*, 112 F. (2d) 430 (C. C. A. 7th, 1940); *Phillips v. Sager*, 276 Fed. 625 (App. D. C. 1921); *Chew v. First Presbyterian Church of Wilmington, Del., Inc.*, 237 Fed. 219 (D. Del. 1916); *Colgate v. James T. White & Co.*, 169 Fed. 887 (C. C. S. D. N. Y. 1909); *Harriman v. Northern Securities Co.*, 132 Fed. 464 (C. C. N. J. 1904), reversed, 134 Fed. 331 (C. C. A. 3rd, 1905), affirmed, 197 U. S. 244; *Cohen v. Delawina*, 404 Fed. 946 (C. C. Maine 1900).

¹⁷ *E. g.*, *Stein v. Bienville Water Supply Co.*, 32 Fed. 876 (C. C. S. D. Ala. 1887), denying an injunction *pendente lite* as between private parties where the public water supply of a city was involved. The public interest was also a ground for denial of relief as between private parties in *Marconi Wireless Telegraph Co. v. Simon*, 227 Fed. 906 (S. D. N. Y. 1915). See *Gulf, M. & N. R. Co. v. Illinois Cent. R. Co.*, 21 F. Supp. 282 (W. D. Tenn. 1937).

¹⁸ *E. g.*, *Tennessee Valley Authority v. Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710; *Railroad Commission of Alabama v. Central of Georgia Ry. Co.*, 170 Fed. 225 (C. C. A. 5th, 1909),

conditioned upon the posting of a bond or other security to protect the public interest.¹⁹ (Cf. *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 51.) If no bond is required it is because the subject matter is such that the court can exercise a preservative control over it *pendente lite*.²⁰ But when the case is one where the public interest is substantial and cannot be protected by bond or otherwise the courts are emphatic in rejecting petitions for interlocutory relief.

certiorari denied, 214 U. S. 521; *Pope v. Blanton*, 10 F. Supp. 18 (N. D. Fla. 1935); *Dryfoos v. Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264; *Hannah & Hogg v. Clyne*, 263 Fed. 599 (N. D. Ill. 1919); *F. W. Cook Brewing Co. v. Garber*, 168 Fed. 942 (C. C. M. D. Ala. 1909). See *Hughes, Federal Practice*, Sec. 1023; *Nichols, Cyclopaedia of Federal Procedure*, Sec. 3210; *McKean, The Balance of Convenience Doctrine*, 39 Dickinson L. Rev. 211 (1935).

¹⁹ *Magruder v. Belle Fourche Valley Water Users' Ass'n.*, 219 Fed. 72 (C. C. A. 8th, 1914); *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321 (C. C. A. 8th, 1911), certiorari denied, 220 U. S. 618; *Menominee & Marinette Light & Traction Co. v. City of Menominee*, 11 F. Supp. 989 (W. D. Mich. 1935); *Birkheiser v. City of Los Angeles*, 11 F. Supp. 689 (S. D. Cal. 1935); *Joplin & P. Ry. Co. v. Public Service Commission of Missouri*, 267 Fed. 584 (W. D. Mo. 1919); *Contra Costa Water Co. v. City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal. 1904); *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County*, 163 Fed. 567 (C. C. N. D. Cal. 1908); *Indianapolis Gas Co. v. City of Indianapolis*, 82 Fed. 245 (C. C. Ind. 1897). Cf. *United States v. Dominion Oil Co.*, 241 Fed. 425 (S. D. Cal. 1917). See *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440.

²⁰ Cf. *In re Arkansas Railroad Rates*, 168 Fed. 720 (C. C. E. D. Ark. 1909); *Buffalo Gas Co. v. City of Buffalo*, 156 Fed. 370 (C. C. W. D. N. Y. 1907).

Thus, in *Tennessee Valley Authority v. Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710, the circuit court of appeals reversed an order of the lower court entering an interlocutory injunction against the Tennessee Valley Authority. The court said (p. 894):

Without denying that some injury may be suffered if the injunction is lifted, it does not so clearly appear that it will of necessity overbalance the injury which must inevitably be suffered by the defendants and the public.

* * * To appraise the injury to the defendants from the disorganization which must follow substantial or even partial cessation of activity is impossible, but that it will be great cannot be denied. So also in respect to the public interest involved. The loss, inconvenience, and discomfort of the residents of the area in failing to obtain cheap electric energy, if it be found in the end that it may lawfully be supplied to them, may likewise not be measured, but equally incontrovertible is it that it will be great. Insofar, also, as restraint will delay effective control of the floodwaters of the Tennessee river and its tributaries, the public interest in the achievement of that objective is similarly beyond appraisal. Human experience of the catastrophic effect upon great areas of overflowing rivers is too recent and too painful to permit of any

doubt either as to the existence or extent of the public interest that is threatened by the maintenance of the injunction, and against which the threat to private interests must be balanced. From such possible injury, it is clear no bond can adequately safeguard the public interest.

In *Dryfoos v. Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264, a temporary injunction against the World War Prohibition Act was refused. Judge Learned Hand said (p. 603):

* * * The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting v. Kansas City Stockyards* (C. C.); 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable; if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not * * *.

(Cf. *Petroleum Co. v. Public Service Comm'n*, 304 U. S. 209, 222-223.)

The observations of Mr. Justice Frankfurter, concurring, in *Mayo v. Canning Co.*, 309 U. S. 310, are applicable, *mutatis mutandis*, here. The company had sued in the federal district

court to enjoin enforcement of a Florida statute regulating the citrus fruit industry. This Court reversed the decree granting a temporary injunction. The concurring opinion emphasized the damage done to the public interest by the granting of the interlocutory decree (pp. 319-322):

Citrus fruit occupies a central and indeed pervasive role in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. * * * In *Nebbia v. New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare * * *

* * * [In this case] the [interlocutory] injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.

I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.

The law furnishes many examples of this preference in favor of the public interest. There are numerous situations in which there is imposed a

duty to obey first and litigate afterwards. The Selective Service Act is an outstanding example.²¹

The principle, however, finds its most frequent application in cases involving property rights. Mr. Justice Brandeis summarized it in *Phillips v. Commissioner*, 283 U. S. 589, 595: "Property rights must yield provisionally to governmental need." Relying on cases involving health measures and wartime controls, the opinion added (pp. 596-597):

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate (*Springer v. United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co. v. Bowland*, 196 U. S. 611, 631). Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing (Compare *North American Cold Storage Co. v. Chicago*, 211 U. S. 306;

²¹ Administrative appeals to the appeal boards and the President are the selectees' only remedy prior to induction since no judicial review is afforded them in advance. E. g., *Petition of Soberman*, 37 F. Supp. 522 (E. D. N. Y. 1941); *Shimola v. Local Board No. 42, for Cuyahoga County*, 40 F. Supp. 808 (N. D. Ohio 1941).

Hutchinson v. Valdosta, 227 U. S. 303; *Adams v. Milwaukee*, 228 U. S. 572, 584). Because of the public necessity, the property of citizens may be summarily seized in wartime (*Central Union Trust Co. v. Garvan*, 254 U. S. 554, 566; *Stoehr v. Wallace*, 255 U. S. 239, 245; *United States v. Pfitsch*, 256 U. S. 547, 553. Compare *Miller v. United States*, 11 Wall. 268, 296; *International Paper Co. v. United States*, 282 U. S. 399; *Russian Volunteer Fleet v. United States*, 282 U. S. 481). And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. (Compare *Kohl v. United States*, 91 U. S. 367, 375; *United States v. Jones*, 109 U. S. 513, 518; *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U. S. 290, 306.)

Congress itself has prohibited stays or injunctive relief where the public interest was deemed sufficiently exigent. In the field of taxation, R. S. 3224 is essentially a provision of this sort. (See *State Railroad Tax Cases*, 92 U. S. 575, 613). An application of the balance of convenience rule was also made under the District of Columbia World War Rent Law (the "Ball Act").²² In *Block v.*

²² Section 110 of the Ball Rent Act, 41 Stat. 298 (1919), provided that rent determinations by the statutory commission should remain in full force and effect pending the final decision on appeal. This provision was applied in *Porter v. Gardner*, 277 Fed. 556 (App. D. C., 1922).

Hirsh, 256 U. S. 135, rejecting the contention that a wartime rent control law allowing tenants to remain in possession at the existing rentals pending judicial review was unconstitutional, Mr. Justice Holmes, speaking for the Court, declared (pp. 157-158):

The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

A similar provision is found in the wartime National Prohibition Act of 1919, Sec. 9, 41 Stat. 312. The Act provided that upon judicial review of orders of the Commissioner of Internal Revenue revoking permits to deal in liquor for non-beverage purposes, the permit should remain revoked pending judicial review. The provision was upheld in *Cywan v. Blair*, 16 F. (2d) 279 (N. D. Ill., 1926); *Spartan Mfg. Co. v. Campbell*, 40 F. (2d) 745 (E. D. N. Y., 1930); *Rondinella v. Campbell*, 40 F. (2d) 746 (E. D. N. Y., 1930); *Triborough Chemical Corp. v. Doran*, 36 F. (2d) 496 (E. D. N. Y. 1929). See *Liscio v. Campbell*, 34 F. (2d) 646 (C. C. A. 2, 1929).

It is difficult to imagine a situation calling more strongly than the present one for the application of the rules limiting the right to a stay. It is plain where the "balance of convenience" lies.

No case of private inconvenience or even hardship can be allowed to avail to disorganize the operation, delicate and precarious enough at best, of the wartime price control program before a full and orderly review has been had. As was stated by the three-judge district court in *Henderson v. Kimmel*, 47 F. Supp. 635, 644-645 (D. Kan. 1942) cited with approval by the Emergency Court of Appeals in upholding the denial of stays, in *Taylor v. Brown*, 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term:

While the inhibition against the granting of the stay until a final decision by the Supreme Court deprives the courts of an historic power—a power as old as the judicial system of the nation, it is deprivation of jurisdiction essential to the successful operation of rent control for the reasons we have heretofore adverted to and is justified under the war power, to insure the safety of the nation and the perpetuation of our liberties. Moreover, a stay is not a matter of right, even if irreparable injury might otherwise result. It is an exercise of judicial discretion and the propriety of its issue ordinarily depends on the circumstances of each case. The considerations we have adverted to would warrant a court in denying a stay and in our judgment warranted the Congress in denying the power to grant the stay. Congress had

the power to impose the duty to obey first and litigate afterwards.

Petitioners specifically complain of the provision of the present Act which requires that judgments of the Emergency Court of Appeals setting aside a regulation shall not become effective until 30 days have passed or until final disposition of the matter by the Supreme Court (section 204 (b)). The Senate Committee in favorably reporting this provision explained its purpose (77th Cong., 2d Sess., S. Rep. No. 931, p. 24):

This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

There is nothing unfamiliar about statutory postponement of the effectiveness of judgments pending review even when the decree is one for injunction. (Cf. *Federal Rules of Civil Procedure*, Rule 62; see especially subdivisions (c) and (g); 28 U. S. C., sections 350, 874). Moreover, it is not uncommon for final injunctions against a governmental entity to be stayed or postponed

for very long periods, even where no appeal is in view, on the ground that the public interest so requires. Thus, in *Wisconsin v. Illinois*, 278 U. S. 367, while an injunction was granted against a sanitary district restraining it from diverting water from the Great Lakes for sewage-disposal purposes, the decree was so framed as to allow sufficient time to the district to find some other means of disposal.

To the same effect are *Mayor and City Council of Baltimore v. Brack*, 3 Atl. (2d) 471 (Md., 1939); *Livezey v. Town of Bel Air*, 199 Atl. 838 (Md., 1938); *Board of Health of Ocean Twp. v. White*, 110 Atl. 43 (N. J. Ct. of Errors and Appeals, 1919); *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995 (1900); *Bogart v. Walker*, 248 N. Y. Supp. 19 (1931); *Sponenburgh v. City of Gloversville*, 87 N. Y. Supp. 602, 96 App. Div. 157 (1904); *Sammons v. City of Gloversville*, 70 N. Y. Supp. 284, 34 Misc. (N. Y.) 459 (1901). See 17 Va. L. Rev. 714-715 (1931).

Cases such as *Ex Parte Young*, 209 U. S. 123, and other cases involving public utilities,²³ which might be taken as indicating that a statute denying the right to a stay is unconstitutional, are not in point. The frequent practice of granting a stay in the public utility rate cases cannot furnish a

²³ E. g., *Driscoll v. Edison Light & Power Co.*, 307 U. S. 104; *Mountain States Power Co. v. P. S. Commission of Montana*, 299 U. S. 167; *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196; *Prendergast v. New York Tel. Co.*, 262 U. S. 43; *Oklahoma Gas Co. v. Russell*, 261 U. S. 290.

model for legislation such as the Emergency Price Control Act, where the bond or court deposit required in the rate cases would be unavailing. Moreover, the essential basis of the rule applied in the rate cases is that the compulsion upon a public utility to accept rates which may give an inadequate return and the sufficiency of which cannot be determined in advance of a protracted judicial investigation may result in a continuing "confiscation" of the utility's property, and ought not to be enforced by heavy cumulative penalties. These considerations are wholly inapplicable to the present Act.

First, the protection which is accorded to utilities against "confiscation" of their property cannot in all instances be given to persons subject to wartime price ceilings. Utilities are few in number, usually enjoy a monopolistic position, and ordinarily must continue to render their services to the public until permission to cease is given. The primary objective in these circumstances must be a balancing of consumer and company interests which will ensure the maintenance of the essential public services furnished by utilities. The standard of fair return fills the need for some basis in fixing proper rates for utility services. Under this Act, however, the considerations of public policy involved are wholly different. The primary objective of the Act is the prevention of inflation. Loss to some sellers is incidental to the accom-

plishment of this vital wartime purpose. *Wilson v. Brown*, 137 F. (2d) 348 (E. C. A., 1943.) The desirability of preventing such losses cannot be permitted to compromise or nullify the essential legislative objective. There is, accordingly, no place under this statute for the concept of fair return which gives rise to the problem of "confiscation" in public utility rate cases. The concept, appropriate though it may be in the public utility field, is derived by analogy from principles of eminent domain (see the concurring opinion in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 602-603, and the authorities there cited) and is wholly inappropriate to a wartime measure for control of inflationary prices. The "just compensation" clause of the Fifth Amendment does not limit Congress in legislating for the general interest to accomplish a general object of national policy under a regulatory statute. Property rights are held subject to proper legislative regulation and any resulting loss is merely consequential or incidental injury (*Omnia Commercial Co., Inc. v. United States*, 261 U. S. 502; *Morrisdale Coal Co. v. United States*, 259 U. S. 188; *Block v. Hirsh*, 256 U. S. 135; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146; *Jacob Ruppert v. Caffey*, 251 U. S. 264).

Second, it would be incompatible with the functioning of the price control law to follow the practice of granting stays as in public utilities cases

during the necessarily protracted judicial hearings required for determination of the reasonableness of fixed rates. Speed is frequently the controlling consideration in the issuance of a price regulation. Protracted formal hearings, whether at the administrative or judicial stage, would postpone the effectiveness of regulations until a threatened price or rent increase had already materialized and had already worked its destruction in the familiar pattern of the inflationary spiral. It is noteworthy that, during the consideration of the various price-control bills, Congress, in addition to its recognition that judicial stays must be prevented (see note 10, pp. 29-31, *supra*), squarely rejected the proposition that formal administrative hearings be required before the issuance of price regulations. (See the Government's Brief, pp. 32-35, in *Bowles v. Willingham*, No. 464.) Congress recognized that the plan established for the issuance and review of price regulations must not be too cumbersome to meet emergency situations.

Third, the principle of decision applied in some public utility cases, and in other types of cases, to the effect that a stay is required as a protection against excessive or cumulative penalties, is not applicable to the present Act. The rule that penalties *pendente lite* are unconstitutional and ought to be stayed if they are so excessive as to deter resort to the courts was originally developed in cases where the only means of obtaining judicial review of a statute or an administrative order was

by committing a violation and awaiting prosecution (*Oklahoma Gin Co. v. Oklahoma*, 252 U. S. 339; *Oklahoma Operating Co. v. Love*, 252 U. S. 331; *Ex parte Young*, 209 U. S. 123; *Federal Trade Commission v. Miller's Nat. Federation*, 23 F. (2d) 968 (App. D. C. 1927); *Allen v. Omaha Live Stock Commission Co.*, 275 Fed. 1 (C. C. A. 8th, 1921)). This condition does not obtain under the present Act, of course. Nor is the Act open to the objection that penalties are laid on the very exercise of the right of review, as in *Terral v. Burke Construction Co.*, 257 U. S. 529.

It is submitted, therefore, that the stay provisions of this Act are a valid exercise of the war powers of Congress, and are fully supported by established principles of public law. These provisions are the most essential feature of the entire statutory plan of review and enforcement. They are indispensable for effective price control. Petitioners' constitutional rights are in no way abridged by these provisions.²⁴

²⁴ *Porter v. Investors Syndicate*, 286 U. S. 461, affirmed on rehearing, 287 U. S. 346, contains a dictum to the effect that a statutory denial of a stay during review of an order revoking licenses under a state Blue Sky law would abridge constitutional rights. It is submitted that the considerations set forth in the preceding pages make the language of the *Porter* case inapplicable to this wartime statute. It may also be observed that in license suspension proceedings under this Act the Administrator is not empowered to suspend, but must apply for a judicial order of suspension which may, in turn, be stayed (Section 205 (f)).

II

THE EMERGENCY PRICE CONTROL ACT DOES NOT
UNLAWFULLY DELEGATE AUTHORITY TO CONTROL
PRICES TO THE ADMINISTRATOR

The question of delegation of power was not regarded by the court below as presenting any serious difficulty. The numerous federal and state decisions—including decisions by two other circuit courts of appeals, the Emergency Court of Appeals, and two state supreme courts—sustaining the delegation made in the present price provisions or in the closely similar rent provisions are collected in the Government's brief in the *Willingham* case, No. 464, pp. 22-23, n. 10.

The attack here ²⁵ is addressed to the statutory declaration of policy, the standards relating to control of prices of processed agricultural commodities, and the asserted lack of findings.

Statement of Policy.—Section 1 (a) of the Act (Appendix, *infra*) sets forth the statutory objectives. It is declared to be in the interest of the national defense and necessary to the effective prosecution of the war that measures be taken for various essential purposes, including stabilization of prices, prevention of inflationary increases in prices and rents, prevention of war-time profiteering and other disruptive practices resulting from wartime scarcities, and protection of persons with fixed and limited incomes against

²⁵ The delegation issue is raised only in No. 375.

undue impairment of living standards. The legislative policy so expressed is definite and clear; it plainly satisfies the requirements which have been stated by this Court. See *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (Fair Labor Standards Act);²⁶ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (Bituminous Coal Act);²⁷ *United States v. Rock Royal Co-op.*, 307 U. S. 533 (milk marketing provisions of Agricultural Marketing Agreement Act);²⁸ *Mulford v. Smith*,

²⁶ The pertinent provision, 29 U. S. C. 208 (a) provides that wage orders shall be issued to attain—

“as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce * * *.”

²⁷ The pertinent provision, 15 U. S. C. 828, provides:

“Regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.”

²⁸ The pertinent provision, 7 U. S. C. 602, provides:

“* * * to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period * * *

307 U. S. 38 (tobacco marketing quota provisions of the Agricultural Adjustment Act.)²⁹

Petitioners have focused on one of the stated objectives, the protection of persons with relatively fixed incomes from undue impairment of their standard of living (Br. in No. 375, pp. 12-17). But this is obviously one of the purposes which will be served by stabilization of prices; and the Administrator has no roving commission to choose other means to accomplish the objective.

The statutory standards.—Sections 2 (a), 2 (c), 2 (d), 2 (g) and 2 (h) of the Emergency Price Control Act set forth standards which govern the Administrator's exercise of his authority to control prices. The standards of section 3 of the

"To protect the interest of the consumer by (a) approaching the level of prices * * * by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand * * * and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish * * *"

²⁹ The pertinent provision, 7 U. S. C. 1282, provides:

"* * * to regulate interstate and foreign commerce in * * * tobacco * * * to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices."

Act of October 2 likewise apply.³⁰ The standards mentioned are detailed and specific; they carefully circumscribe the Administrator's discretion, guiding him in respect of when he may act and how he may act.

The Administrator may promulgate price regulations when in his judgment "the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act" (Act, Section 2 (a)). Petitioners concede that such a rise or threatened rise of beef prices preceded the present administrative action (No. 375, Pet. Brief, p. 60). The Act does not leave the promulgation of price regulations to the Administrator's subjective and unconfined discretion. He must examine the pertinent data objectively to determine whether the promulgation of a regulation would effectuate the Act's purposes.³¹ The grant of

³⁰ Executive Order 9250 (7 F. R. 7871) directed the Administrator to exercise the authority conferred on the President by the amendatory Act to stabilize prices of agricultural commodities and products processed from agricultural commodities, so far as practicable, on the basis of levels which existed on September 15, 1942. Section 2 of the Act authorizes the President to redelegate in this manner.

³¹ The circumstance that the Administrator must exercise "judgment" as to whether action would achieve the Act's purposes does not vitiate the conclusion that his discretion in determining whether to act is properly circumscribed. A provision of this nature is as necessary to sensible regulation as it is familiar. Thus in *United States v. Rock Royal*

power, moreover, acquires meaning from the clearly stated objectives of the Act (see pp. 61-62, supra). Cf. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 165-166. And the discretion reposed in the Administrator to select the commodities which are to be controlled is a recognition of the practical necessities of administration under such a wartime program. Cf. *United States v. Rock Royal Co-op.*, 307 U. S. 533. Inflationary events may demand control of some prices and not of others. Regulation of producers' or distributors' prices may serve as an effective check on price increases by their suppliers. The law does not require that all products be uniformly controlled or exempted from control. Cf. *Tigner v. Texas*, 310 U. S. 141.³²

Co-op., 307 U. S. 533, the Court held lawful a delegation of authority to the Secretary of Agriculture which provided that he might initiate action whenever he "has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title" (7 U. S. C. 608c (3)). Similarly in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, the Court upheld the Joint Resolution of July 16, 1918, which authorized the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense, * * * and to operate the same in such manner as may be needful or desirable" (40 Stat. 904). Plainly, the Act is not invalid simply because the Administrator is entitled to exercise his judgment; such an exercise is implicit in such standards as "public convenience and necessity," "public interest," "just and reasonable," and similar traditionally proper standards.

³² Under the present legislation, which contains a conditional grant of authority to control livestock prices (original Act, Secs. 2, 3; Amendatory Act, Secs. 1-3) any objection

The Acts contain detailed standards governing the determination of maximum price levels. Not only must the prices fixed be "generally fair and equitable," and "effectuate the purposes of this Act" (Act, Section 2 (a)), but in addition and going beyond the usual provisions governing rate making, price fixing and wage determinations, which contain the familiar requirements of fairness, equity, or reasonableness, there is here a statutory guide in terms of time, that is, in terms of prices actually prevailing as of a given period. The basic Act directs the Administrator to give consideration, so far as practicable, to prices prevailing between October 1 and October 15, 1941. By the amendatory Act, stabilization of prices at the levels of September 15, 1942 is directed so far as practicable, a standard thus being provided for the guidance of the Administrator in holding fast against further price increases. It may be observed that the "dollars-and-cents" ceilings established by Revised Maximum Price Regulation No. 169 set prices at a level slightly higher than those prevailing between March 16 and March 28, 1942²³ and resulted in stabilization

addressed to asserted discrimination in favor of livestock sellers would seem to involve issues going to the validity of a particular regulation and would thus be barred by Section 204 (d). Such an objection in any event would not involve an issue of delegation.

²³ See Statement of Considerations accompanying Revised Maximum Price Regulation No. 169, OPA Service 41:339. This document was filed with the Division of the Federal

of beef prices on the basis of levels existing on September 15, 1942.³⁴

The basic Act (Sec. 2 (a)) also provides for adjustments, in the determination of price levels, to take account of such relevant factors as the Administrator "may determine and deem to be of general applicability, including * * * Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits * * * during and subsequent to the year ended October 1, 1941." The similar provision in the rent section of the Act (Sec. 2 (b)) is discussed at p. 20, n. 8, of the Government's brief in the *Willingham* case, No. 464. The considerations and authorities there advanced indicate that it would have been impracticable for Congress rigidly to circumscribe the exercise of judgment by the Administrator as to the efficacy of adopting in particular situations, the statutory guide dates (October 1 to 15, 1941), or as to the weight to be given to particular "relevant" adjustment factors.

Further, under Section 3 of the Act of October 2, the maximum price established for any com-

Register. Under Sec. 2.4 (b) of the Federal Register Regulations, the Director has determined that filing constitutes compliance with the Federal Register Act (44 U. S. C. § 301 et seq.) and has excluded statements of considerations from publication.

³⁴ *Id.*, OPA Service 41:341-C, 41:341-D.

modity processed or manufactured in whole or in substantial part from any agricultural commodity must reflect to the producer of the commodity designated prices as set forth in two numbered clauses of the Section. The provisions of the second clause may be waived upon a finding of necessity to correct gross inequities. Modifications must be made in maximum prices for agricultural commodities or products processed therefrom in any case where it appears that this is necessary to increase production of a commodity for war purposes, or where increased costs since January 1, 1941 are not reflected in the maximum prices. Adequate weighting must be given to farm labor in setting prices for both agricultural products and commodities processed therefrom.

Insofar as practicable, the Administrator must consult with industry representatives before issuing an order affecting them. Finally, the preservation of Congressional guardianship over the authority delegated is indicated by the requirement in Section 301 of the original Act that the Administrator make quarterly reports to Congress, by the provision of the Act limiting its duration to June 30, 1943 (Section 1 (b)), and by the amendment thereto extending the life of the Act only to June 30, 1944 (Amendatory Act, Section 7 (a)).

Findings.—As suggested at pp. 23-27 of the Government's brief in the *Willingham* case, No. 464, the relevancy of the presence or absence of findings to the delegation issue is highly dubious; the question is more properly one which goes to the validity of a particular regulation and should therefore be urged in the exclusive statutory forum (see pp. 15-16, *supra*). It may be noted, however, that Section 2 (a) of the Emergency Price Control Act specifically requires findings in that every maximum price regulation must be accompanied by a "statement of considerations." Findings in support of the present Regulation appear both in the preamble of the Regulation itself and in the Statement of Considerations. The latter contains a thoroughgoing description and analysis of the facts and considerations underlying the provisions adopted. There are findings as to the history, structure, and operation of the beef industry, the problems encountered under earlier price regulations, cattle price trends, the fairness and equitableness of the revised prices, and administrative compliance with the statutory objectives of increased production and price stabilization at the September 15, 1942, levels. In short, the considerations leading to the issuance of the Regulation have been articulated with a fullness that would be uncommon even under peacetime standards.

²⁵ See OPA Service 41: 339 et seq.

CONCLUSION

For the foregoing reasons the judgments below should be affirmed.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

✓ PAUL A. FREUND,
Special Assistant to the Attorney General.

THOMAS I. EMERSON,
Deputy Administrator,

ABRAHAM GLASSER,

DAVID LONDON,

A. M. DREYER,

HARRY L. SHNIDERMAN,
Office of Price Administration.

JANUARY 1944.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 375

**BENJAMIN ROTTENBERG AND B. ROTTENBERG,
INC., PETITIONERS,**

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1943.

CERTIORARI GRANTED NOVEMBER 8, 1943.

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1942.

No. 3885.

BENJAMIN ROTTENBERG ET AL.,
DEFENDANTS, APPELLANTS,

v.

UNITED STATES OF AMERICA.,
APPELLEE.

CONSOLIDATED APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS,
FROM JUDGMENTS (WYZANSKI, J.), MARCH 10, 1943.

TRANSCRIPT OF RECORD.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
for Appellants.

EDMUND J. BRANDON;
UNITED STATES ATTORNEY,
WILLIAM T. MCCARTHY;
JOSEPH J. GOTTLIEB,
ASSISTANT UNITED STATES ATTORNEYS,
for Appellee.

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**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1942.

No. 3885,

**BENJAMIN ROTTENBERG ET AL.,
DEPENDANTS, APPELLANTS,**

v.

**UNITED STATES OF AMERICA,
APPELLEE.**

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 16074, CRIMINAL,

THE UNITED STATES, by Indictment,

v.

BENJAMIN ROTTENBERG.

**APPEAL OF BENJAMIN ROTTENBERG FROM JUDGMENT OF
CONVICTION ENTERED ON MARCH 10, 1943.**

**(CASE NO. 16075 CONSOLIDATED WITH CASE NO. 16074
FOR APPEAL.)**

INDICTMENT.

February 24, 1943.

**DISTRICT COURT OF THE UNITED STATES OF AMERICA
District of Massachusetts**

At a District Court of the United States of America, for the
District of Massachusetts, begun and holden at Boston, within
and for said District, on the first Tuesday of December in the
year of our Lord one thousand nine hundred and forty-two.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that

COUNT ONE:

1. Benjamin Rottenberg of Boston in the District of Massachusetts is made the defendant herein. The said defendant at all times hereinafter referred to was and is President and Treasurer of B. Rottenberg Co., Inc., a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having an usual place of business at Boston in the District of Massachusetts, and at all times hereinafter referred to, said defendant was engaged at said place of business in the sale at wholesale of beef and veal carcasses and wholesale cuts thereof.

2. On or about the tenth day of December, 1942, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169, effective December 16, 1942, establishing maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof. At all times hereinafter mentioned said Revised Maximum Price Regulation No. 169 has been and is in full force and effect.

3. At all times hereinafter referred to, said Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress), Approved January 30, 1942.

4. At all times hereinafter referred to, Revised Maximum Price Regulation No. 169, Section 1364.401, provides that on or after December 16, 1942, regardless of any contract, agreement, or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cuts, and no person shall buy or receive any beef carcass or beef wholesale cuts at a price higher than the maximum price permitted by Section 1364.451, and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

5. At all times hereinafter referred to, the sale and delivery

of beef and veal carcasses and wholesale cuts thereof was a matter within the jurisdiction of the Office of Price Administration.

6. At all times hereinafter referred to, the Office of Price Administration was an agency of the United States by virtue of the provisions of Section 201 of the aforesaid Emergency Price Control Act of 1942.

7. At all times hereinafter referred to, the maximum prices for beef and veal carcasses and wholesale cuts thereof were determined under Section 1364.451.

8. The defendant, on or about the eighteenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, did wilfully, unlawfully, and knowingly violate Section 4 (a) of the Emergency Price Control Act of 1942, as amended, in that the said defendant Benjamin Rottenberg did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two rumps and rounds of beef, of Commercial Grade, weighing 341 pounds, for a total price of \$112.53.

COUNT TWO:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-first day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised

Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Choice Grade, weighing 386 pounds, and four hindquarters of beef, of Commercial Grade, weighing 734 pounds, for a total price of \$377.32.

COUNT THREE.

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly, and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Utility Grade, weighing 307 pounds, two hindquarters of beef, of Cutter Grade, weighing 300 pounds, five hindquarters of beef, of Cutter Grade, weighing 683 pounds, four hindquarters of beef, of Cutter Grade, weighing 617 pounds, one forequarter of beef, of Cutter Grade, weighing 125 pounds, five forequarters of beef, of Utility Grade, weighing 627 pounds, for a total price of \$963.45.

COUNT FOUR:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fourteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachu-

setts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes six hindquarters of beef, of Commercial Grade, weighing 912 pounds, one hindquarter of beef, of Utility Grade, weighing 142 pounds, and one hindquarter of beef, of Cutter Grade, weighing 136 pounds, for a total price of \$404.60.

COUNT FIVE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Good Grade, weighing 331 pounds, for a total price of \$125.00.

COUNT SIX:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of February in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Natale Lania, of Waverly, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Natale Lania one hindquarter of beef, of Good Grade, weighing 172 pounds, for a total price of \$56.76.

COUNT SEVEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the thirty-first day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Cosmo C. Damiano, of Newton Centre, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Cosmo C. Damiano one hindquarter of beef, of Good Grade, weighing 162 pounds, for a total price of \$56.31.

COUNT EIGHT:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the sixth day of January in the year nineteen hun-

dred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Cosmo C. Damiano, of Newton Centre, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Cosmo C. Damiano one hindquarter of beef, of Utility Grade, weighing 195 pounds, for a total price of \$71.49.

COUNT NINE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the second day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini two hindquarters of beef, of Utility Grade, weighing 319 pounds, two hindquarters of beef, of Good Grade, weighing 361 pounds, one hindquarter of beef, of Choice Grade, weighing 207 pounds, and one hindquarter of beef of Commercial Grade, weighing 198 pounds, for a total price of \$452.09.

COUNT TEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini five hindquarters of beef, of Utility Grade, weighing 594 pounds, and two hindquarters of beef, of Utility Grade, weighing 220 pounds, for a total price of \$284.90.

COUNT ELEVEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fourteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini two hindquarters of beef, of Commercial Grade, weighing 310 pounds, and six hindquarters of beef, of Utility Grade, weighing 773 pounds, for a total price of \$368.22.

COUNT TWELVE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the nineteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini six hindquarters of beef, of Commercial Grade, weighing 1055 pounds, for a total price of \$369.25.

COUNT THIRTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Samuel Burgoyne, of Lexington, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Samuel Burgoyne two hindquarters of beef, the grade of which is to your Grand Jurors unknown, weighing approximately 253½ pounds, for a total price of \$83.66.

COUNT FOURTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventeenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon three hindquarters of beef, of Utility Grade, weighing 404 pounds, for a total price of \$125.24.

COUNT FIFTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-fourth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon three forequarters of beef, of Utility Grade, weighing 442 pounds, and three hindquarters of beef, of Utility Grade, weighing 356 pounds, for a total price of \$232.50.

COUNT SIXTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-eighth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon; of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon four hindquarters of beef, of Utility Grade weighing 489 pounds, two hindquarters of beef, of Commercial Grade, weighing 294 pounds, and two hindquarters of beef, of Utility Grade, weighing 209 pounds, for a total price of \$347.20.

COUNT SEVENTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon six hind

quarters of beef, of Utility Grade, weighing 696 pounds, and two forequarters of beef, of Utility Grade, weighing 242 pounds, for a total price of \$304.40.

COUNT EIGHTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the second day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon two forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 234 pounds, for a total price of \$65.52.

COUNT NINETEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say,

the said defendant did sell and deliver to Joseph Gordon five forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 642 pounds, and six hindquarters of beef, the grade of which is to your Grand Jurors unknown, weighing 898 pounds, for a total price of \$476.10.

COUNT TWENTY:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the eighth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon four hindquarters of beef, of Commercial Grade, weighing 579 pounds, for a total price of \$202.65.

A True Bill.

EARL B. MUNRO,

Foreman of the Grand Jury.

Joseph J. Gottlieb,

Assistant United States Attorney for the

District of Massachusetts.

DISTRICT OF MASSACHUSETTS,

February 24, 1943.

Returned into the District Court by the Grand Jurors and filed.

ARTHUR M. BROWN,

Deputy Clerk.

This indictment is presented by the grand jury at the present December Term of this court, 1942, when, on February 24, 1943,

the Honorable George C. Sweeney, District Judge, sitting, the said Benjamin Rottenberg is set to the bar, and, having waived the reading of the indictment, says that thereof he is not guilty.

At the same term, on March 1, 1943, the defendant files the following Motion to Quash the Indictment:

MOTION TO QUASH THE INDICTMENT.

[Filed March 1, 1943.]

Now comes the defendant, Benjamin Rottenberg, by his counsel, and moves the court to quash the indictment herein and each and every count thereof, upon the following grounds:

1. That the indictment and no count thereof sets forth a criminal offense against the United States of America.
2. That the indictment and no count thereof sets forth an offense against the United States of America with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.
3. That the allegations in the indictment and each and every count thereof do not set forth the essential elements of the offense with sufficient clearness, uncertainty and particularity to enable the defendant to understand the nature of the charge against him, more particularly in that

(a) The indictment in each count thereof purports to charge the defendant with a violation of Section 4 (a) of the Emergency Price Control Act of 1942 as amended, in that the defendant is alleged to have sold and delivered wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended, the sale and delivery of which is prohibited at prices higher than those established by said Section, and

(b) The maximum price of each wholesale beef cut in each of said counts, is therefore an essential element to the commission of the offense stated and various unit prices apply to different wholesale beef cuts but are not set forth in said indictment or

any count thereof and does not apprise the defendant of whether the prices charged on each wholesale cut of beef is in fact higher than those provided for by said Revised Maximum Price Regulation No. 169 as amended; and

(c) The maximum price of each of said wholesale beef cuts is determined not only under Section 1364.451 of said Revised Maximum Price Regulation No. 169, as amended, as alleged in paragraph 7 of the indictment and every count thereof, but also under Sections 1364.452, 1364.453 and 1364.454 of said Regulation.

4. In each count of the indictment herein the allegations of fact necessary to constitute a crime against the United States of America are insufficient, uncertain and ambiguous.

5. That the allegations in the indictment and each count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal, he would not be able to plead former jeopardy.

6. That the Act of Congress known as the Emergency Price Control Act of 1942, as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

7. That the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

9. That the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, pointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

10. Revised Maximum Price Regulation No. 169 as amended, is invalid in whole or in part for the reason that it was founded upon indefinite or indeterminable standards which could not be known or determined at the time of the issuance of the said Regulation and not so sufficiently established as to support an indictment for a criminal offense under any of its terms.

11. Revised Maximum Price Regulation No. 169 as amended, upon which the indictment and each and every count thereof is predicated infringes upon the power of Congress to make and enact laws of the United States.

12. Revised Maximum Price Regulation No. 169 as amended, arbitrarily, capriciously and unreasonably established such low maximum prices in the area where the defendant conducted his business as set forth at the time stated in the indictment as to invade the property rights of the defendant without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

13. Revised Maximum Price Regulation No. 169 as amended, is unjust and unreasonable and therefore invalid under the Constitution of the United States of America and more particularly under Article 1, Section 1 thereof, and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and

wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcass and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

14. That the Regulation upon which the indictment and each count thereof is predicated, is dependent upon determinations of fact, which determinations are not shown as required by law:

15. That Revised Maximum Price Regulation No. 169 as amended, issued by the Price Administrator is based upon a statement of purported consideration representing the opinion of the Price Administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942 as amended.

16. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported considerations representing the opinion of the price administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

17. That Revised Maximum Price Regulation No. 169 as amended, is invalid because it was issued without prior approval of the Secretary of Agriculture in violation of Section 3 (c) of the Emergency Price Control Act of 1942.

18. That Revised Maximum Price Regulation No. 169 as amended, is invalid because the maximum prices fixed thereby for beef and veal carcasses and wholesale cuts thereof in this District are so unreasonable as to constitute a taking of private property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States of America.

19. Where it does not appear from any Act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each

count therein that he has given consideration as required by the amendment to the Emergency Price Control Act, Acts of Congress, October 2, 1942 to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing then Section 1364.451 is invalid in whole or in part by reason of the failure of the Price Administrator to so consider.

20. The terms of the Revised Maximum Price Regulation No. 169 as amended, are too vague, indefinite and uncertain

(a) to guide the defendant with reasonable certainty in determining what conduct is permissible, and what conduct is punishable so as to enable him to prepare and make his defense, thus depriving him of his property in violation of the Fifth Amendment to the Constitution of the United States of America;

(b) to satisfy the requirement of the Sixth Amendment to the Constitution of the United States of America by apprising the defendant with reasonable certainty of the conduct which will render him liable to punishment for the commission of the offences with which he is charged; and

(c) to enable the defendant to plead an acquittal or conviction to the offenses with which he is charged in the indictment herein in bar to a further prosecution against him based upon the same matters or things, or any of them on which the indictment is laid.

21. That the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) in so far as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price for maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is void, because of unconstitutional delegation of legislative power.

22. The Emergency Price Control Act of 1942 is invalid because

it purports to exercise the police power which is reserved to the states respectively or to the people under the provisions of the Tenth Amendment to the Constitution.

23. That count 1 of said indictment alleges that the defendant sold and delivered "rumps and rounds" at prices higher than set forth by the maximum price determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended, but no such wholesale cut as "rumps and rounds" for which a price can be determined is set forth in said Regulation.

Wherefore, the defendant prays that he be not held to answer further to said indictment.

By his Attorneys,

JOHN H. BACKUS.

LEONARD PORETSKY.

On the same day, the foregoing motion to quash came on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and after argument thereon is denied.

At the same term on March 3, 1943, the defendant files the following Motion to Amend his Motion to Quash:

AMENDMENT TO MOTION TO QUASH INDICTMENT

[Filed March 3, 1943.]

Now comes the above-named defendant and moves to amend motion to quash by adding thereto the following:

Section 2 (a) Emergency Price Control Act Public Law 421—77th Congress requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provisions of this sub-section (Section 2 (a)) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order".

And it appearing as a requirement of law that such regulation order or consideration shall be filed with the Division of the Federal Register and it further appearing from the provisions of Re-

vised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said Regulation were filed with the Division of the Federal Register and by the provisions of the Act of Congress October 2, 1942 it is required that Section 3 (2) "in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing"; provided further, "that in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity as provided in this Act adequate weighting shall be given to farm labor".

And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

- 1st.—a generally fair and equitable margin for processing an agricultural commodity including livestock; and
- 2nd—adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in whole or in part to so consider and this defendant should not be called upon to plead further and this indictment should be quashed.

By his Attorneys,

JOHN H. BACKUS.
LEONARD PORETSKY.

On the same day, the foregoing motion to amend the motion to quash comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and is denied by the court if it has jurisdiction so to do.

On the same day it is ordered by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, that this indictment and indictment No. 16075, United States v. B. Rottenberg Co., Inc., be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and a jury is duly empanelled and sworn to try the issue, videlicet, Benjamin Knudson, Jr., Foreman, Milford F. Daniels, Eugene T. Ricketson, Don Allen Rogers, Thomas P. Smith, William H. Manning, C. Lane Goss, John A. McGowan, Frank B. Howland, Charles F. Breed, Thomas R. Brown, Thomas C. Hooyer.

This cause, together with cause numbered 16075, comes on for trial on the pleadings and evidence on the third, fourth, and fifth days of March, 1943.

On the fifth day of March, 1943, at the close of the evidence, the defendant renews his motion to quash the indictment and upon consideration thereof the motion is denied by the court.

On the same day the defendant files the following Motion for Directed Verdict on Counts 1 and 2 of the Indictment on the Ground of Variance:

**MOTION FOR DIRECTED VERDICT ON COUNTS 1 AND 2
OF THE INDICTMENT ON THE GROUND OF VARIANCE.**

[Filed March 5, 1943.]

Now comes the defendant, Benjamin Rottenberg, and moves that the jury be directed to return a verdict of Not Guilty on counts 1 and 2 of the indictment on the ground of variance for the following specified reasons:

1. That in count 1 of the indictment the defendant is alleged to have sold and delivered wholesale cuts of beef to Morris Kepnes of Chelsea, Massachusetts at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the defendant did sell and deliver "two ramps and rounds of beef of commercial grade weighing 341 pounds for a total price of \$112.53".

That in support of said count in the indictment the Government

offered testimony from the witness Morris Kepnes, that he purchased "two grade A rumps and rounds".

That your defendant respectfully submits that Grade A rumps and rounds are classified as "good" and not of "commercial" grade as alleged in the indictment.

2. That in count 2 of the indictment the defendant is alleged to have sold and delivered wholesale cuts of beef to Morris Kepnes of Chelsea, Massachusetts at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the defendant did sell and deliver to Morris Kepnes "two hindquarters of beef, of choice grade weighing 386 pounds and four hindquarters of beef of commercial grade weighing 734 pounds for a total price of \$377.32".

That in support of said count in the indictment the Government offered testimony from the witness Morris Kepnes that he purchased "two choice hindquarters AA and four choice Heifer hinds".

That your defendant respectfully submits that testimony that "four choice Heifer hinds" were purchased cannot support or prove the allegation in the indictment that the defendant did sell and deliver "four hindquarters of beef of commercial grade".

By his Attorneys,

JOHN H. BACKUS.

LEONARD PORETSKY.

On the same day the court grants the motion for directed verdict on count 2 of the indictment and denies the motion as to count 1.

On the same day defendant files a motion for directed verdict upon all the counts of the indictment which is granted as to counts 2, 6, 7, 8, 13, and 14 and denied as to the remaining counts.

This cause is thereupon committed to the jury, who, after hearing all matters and things concerning the same, return their verdict

therein and upon oath say that the defendant is guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20 and that by direction of the court upon counts 2, 6, 7, 8, 13, and 14 the defendant is not guilty.

Thereupon on March 9, 1943, the defendant files the following Motion in Arrest of Judgment:

MOTION IN ARREST OF JUDGMENT.

[Filed March 9, 1943.]

Now comes the above named defendant in the above entitled cause, and moves that the verdict returned against him by the jury on the fifth day of March, 1943, be set aside, revoked, stopped and stayed as if no verdict had been returned against him for the following reasons:

1. The provisions of Emergency Price Control Act of 1942, Sections 204 (a), (b), (c) and (d) which oust the trial court of jurisdiction to pass upon the validity of any regulation, order or price schedule made by the price administrator is unconstitutional in that it violates the Sixth Amendment to the Constitution of the United States by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

2. The provisions of Emergency Price Control Act of 1942, Sections 204 (a), (b), (c) and (d) requiring that the issue in a criminal case be tried partly in one court and partly in another is unconstitutional and void in that it violates the Sixth Amendment to the Constitution of the United States by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

3. That Revised Maximum Price Regulation No. 169 as amended, is unconstitutional and void in that it restricts or limits the price or prices to be charged by slaughterers and wholesalers and favors the farmer over the slaughterer and the producer over the processor by not limiting or restricting prices which may be charged by the farmer or producer.

4. The Revised Maximum Price Regulation No. 169 as amended, Section 1364.451 (b) which requires the defendant to determine and fix what is the maximum ceiling price in accordance with the provisions of paragraph (a) of Section 1364.451 and specified in Section 1364.452 minus the required deduction specified in Section 1364.453 plus permitted additions in Section 1364.454 is a mathematical problem of variable content.

5. The Revised Maximum Price Regulation No. 169 as amended, Section 1364.451 requires the defendant to define and fix the crime with which he is charged and is in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States.

6. Neither count in the indictment sets forth with the certainty and definiteness required by the rules of criminal pleading a crime to which the defendant can plead former conviction or double jeopardy in that the indictment and no count thereof specifies a price unit at which the defendant is alleged to have sold each wholesale cut.

7. Revised Maximum Price Regulation No. 169 as amended is invalid in whole or in part because it establishes under Section 1364.453 (c) a lower price for beef carcasses and beef wholesale cuts sold to a wholesaler than those which are applicable to a retailer purchasing the same article from the same seller.

By his Attorneys,

JOHN H. BACKUS.
LEONARD PORETSKY.
WILLIAM H. LEWIS.

Denied 3/10/43

CHARLES E. WYZANSKI, Jr.,

USDJ.

On March 10, 1943, the court, after hearing, denies the defendant's motion in arrest of judgment.

On the same day the defendant files the following Motion for a New Trial:

MOTION FOR NEW TRIAL.

[Filed March 10, 1943.]

Now comes Benjamin Rottenberg, the above-named defendant in the above-captioned cause, and moves that the verdict returned against him by the jury on March 5, 1943, be set aside, revoked, stopped and stayed as if no verdict had been returned against him and that he be granted a new trial upon the following newly discovered evidence which was not available to him at the time of his trial:

That at a hearing of the subcommittee of the committee on Agriculture and Forestry held at Washington, D. C., on Wednesday, March 3, 1943, the Honorable Prentiss M. Brown, price administrator testified and declared as follows:

Senator Bushfield. Pardon me for interrupting, Senator, (Brown) this testimony that has been given here by the meat men, that it is simply impossible for them to make ends meet on meat that they sell the Government—of course, you don't uphold that situation, do you?

Mr. Brown. No. I am going into that right now, Senator. That is the main subject of my discussion. I want to say that I think I am being educated, and the committee is being educated, very well by that bugaboo of the farmer and the consumer, the middle man. It seems to me he has made a pretty good case here. There is a subcommittee of Agriculture now, I think, about to look into the question of why the spread between the producer and the consumer. I think Mr. Cooke and Mr. La Roe have given us a pretty good answer to that question, and I hope that subcommittee reads that testimony. The middle man performs a very necessary function.

Now, Mr. Chairman, I want to admit frankly that these gentlemen are right in their contention that they are entitled to the same margin on the reduced production of their goods

that they had under uncontrolled conditions. I think they not only have made a good case along that line, but it is clear, under the McKellar Amendment to the Price Control bill, which all of us agree to, that that right is definitely set forth in the statute and should be followed, and I don't think it has been followed.

The Chairman. That is, that they shall receive a reasonable profit.

Mr. Brown. A reasonable profit, yes, a reasonable margin.
(Transcript of testimony, pages 749 and 750.)

Senator Aiken. And you don't contemplate fixing the ceiling on hogs, and we will say other products, until and unless the situation shows signs of getting completely out of hand?

Mr. Brown. That is right. But I am going to do every thing I can to see that these people who are here today get a reasonable margin, which ought to be the margin they got previous to the imposition of these terrible restrictions.

(Transcript of testimony, pages 760 and 761.)

By his Attorneys,

WILLIAM H. LEWIS.

LEONARD PORETSKY.

JOHN H. BACKUS.

Denied 3/10/43.

CHARLES E. WYZANSKI, Jr.

On the same day the foregoing motion, after consideration, is denied by the court.

On the same day the following Judgment and Commitment is entered:

JUDGMENT AND COMMITMENT.

March 10, 1943.

On this tenth day of March, 1943, came the United States Attorney, and the defendant Benjamin Rottenberg appearing in proper person, and by counsel and,

The defendant having been convicted on Verdict of Guilty of the offense charged in counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20 in the indictment in the above-entitled cause, to wit: Violation of Revised Maximum Price Regulation 169, as amended, of the Emergency Price Control Act of 1942, as amended (Public Law 421, 77th Congress), Approved January 30, 1942; it is by the court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the type to be designated by the Attorney General or his authorized representative for the period of six months and to pay a fine of one thousand (1000) dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further ordered that the clerk deliver a certified copy of this judgment and commitment to the United States marshal or other qualified officer and that the same shall serve as the commitment herein.

CHARLES E. WYZANSKI, JR., *Judge.*

From the foregoing judgment the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

On the eighth day of April, 1943, the defendant files a motion to extend time for filing bill of exceptions, which motion is duly allowed by the court, the Honorable Charles E. Wyzanski, Jr., sitting, and the time for filing the bill of exceptions is extended to June 20, 1943.

BILL OF EXCEPTIONS.

[Filed in No. 16074 and No. 16075 on May 6, 1943.]

These are two indictments consolidated for trial, No. 16074 relating to the individual defendant and No. 16075 to the corporate defendant each brought under the Emergency Price Con-

trof Act of 1942 as amended wherein the defendants are charged with violating Section 4 (a) of the same Act and Section 1364.401 of Revised Maximum Price Regulation No. 169 as amended, hereinafter called the Regulation by wilfully, knowingly and unlawfully selling wholesale cuts of beef at prices in excess of the maximum prices permitted under Section 1364.451 of said Regulation:

Count 1. Charging that on or about December 18, 1942, the defendants did sell and deliver to Morris Kepnes 2 rumps and rounds of beef of commercial grade weighing 341 pounds for a total price of \$112.53;

Count 3. Charging that on or about January 7, 1943, the defendants did sell and deliver to Morris Kepnes 5 fores of beef of utility grade weighing 627 pounds, 2 hinds of beef of utility grade weighing 307 pounds, 1 fore of beef of cutter grade weighing 125 pounds and 11 hinds of beef of cutter grade weighing 1600 pounds for a total price of \$963.45.

Count 4. Charging that on or about January 14, 1943, the defendants did sell and deliver to Morris Kepnes 6 hinds of beef of commercial grade weighing 912 pounds, 1 hind of beef of utility grade weighing 142 pounds and 1 hind of beef of cutter grade weighing 156 pounds for a total price of \$404.60;

Count 5. Charging that on or about January 15, 1943, the defendants did sell and deliver to Morris Kepnes 2 hinds of beef of good grade weighing 331 pounds for a total price of \$125.00;

Count 9. Charging that on or about January 2, 1943, the defendants did sell and deliver to Joseph Scappini 2 hinds of beef of utility grade weighing 319 pounds, 2 hinds of beef of good grade weighing 361 pounds, 1 hind of beef of commercial grade weighing 198 pounds; 1 hind of beef of choice grade weighing 207 pounds, for a total price of \$452.09;

Count 10. Charging that on or about January 5, 1943, the defendants did sell and deliver to Joseph Scappini 7 hinds of beef of utility grade weighing 814 pounds for a total price of \$284.90;

Count 11. Charging that on or about January 14, 1943, the defendants did sell and deliver to Joseph Scappini 2 hinds of beef of commercial grade weighing 310 pounds, 6 hinds of beef of utility grade weighing 773 pounds for \$368.22;

Count 12. Charging that on or about January 19, 1943, the defendants did sell and deliver to Joseph Scappini 6 hinds of beef of commercial grade weighing 1055 pounds for \$369.25;

Count 14. Charging that on or about December 17, 1942, the defendants did sell and deliver to Joseph Gordon 3 hinds of beef of utility grade weighing 404 pounds for \$125.24;

Count 15. Charging that on or about December 24, 1942, the defendants did sell and deliver to Joseph Gordon 3 fores of beef of utility grade weighing 442 pounds and 3 hinds of beef of utility grade weighing 356 pounds for a total price of \$232.50;

Count 16. Charging that on or about December 28, 1942, the defendants did sell and deliver to Joseph Gordon 6 hinds of beef of utility grade weighing 698 pounds, 2 hinds of beef of commercial grade weighing 294 pounds for a total price of \$347.20;

Count 17. Charging that on or about January 5, 1943, the defendants did sell and deliver to Joseph Gordon 6 hinds of beef of utility grade weighing 696 pounds and 2 fores of beef of utility grade weighing 242 pounds for a total price of \$304.40;

Count 18. Charging that on or about January 2, 1943, the defendants did sell and deliver to Joseph Gordon 2 fores of beef of unknown grade weighing 234 pounds for \$65.52;

Count 19. Charging that on or about January 7, 1943, the defendants did sell and deliver to Joseph Gordon 5 fores of beef of unknown grade weighing 642 pounds, 6 hinds of beef of unknown grade weighing 898 pounds for a total price of \$476.10;

Count 20. Charging that on or about January 8, 1943, the defendants did sell and deliver to Joseph Gordon 4 hinds of beef of commercial grade weighing 579 pounds for \$202.65.

Each defendant seasonably filed motions to quash the indictment as a whole and to each count thereof. The motions came on for hearing on March 1, 1943, and were denied after argu-

ment. By leave of court, the defendants were permitted to file an amendment to each motion to quash which was also denied. The denials were for the reasons set forth in the memorandum filed by the court on March 2, 1943, in the matter of United States v. J. Slobodkin, United States v. J. Slobodkin Co. Inc., and United States v. B. Rottenberg, Inc. et als. which may be referred to. The defendants being aggrieved by the court's denial of the motions to quash and amendments thereto duly claimed exceptions.

Thereafter the defendants having pleaded Not Guilty were set to trial before Wyzanski, J., and a jury on the third day of March, 1943. At the close of the evidence, each defendant filed a motion to dismiss count 1 of each indictment on the ground of variance, and filed certain requests to instruct the jury on rulings of law which will be hereinafter set forth. The court denied the dismissal of count 1 of each indictment on the ground of variance, but granted a motion for a directed verdict on counts 2, 6, 7, 8 and 13 for the corporate defendant and on counts 2, 6, 7, 8, 13 and 14 for the individual defendant, and refused to instruct the jury on the rulings of law numbered 17 to 33 inclusive as requested, whereupon in each instance the defendants duly excepted.

Thereafter on the 5th of March, 1943, the jury returned a verdict of "Guilty" on each count of each indictment submitted and thereafter, on the tenth day of March, 1943, each defendant made a motion in arrest of judgment and a motion for a new trial on the ground of newly-discovered evidence which were denied and each defendant duly claimed exceptions thereto. On the same day, the individual defendant was sentenced to imprisonment for a term of six months and to pay a fine of one thousand (\$1,000) dollars and the corporate defendant was sentenced to pay a fine of one thousand (\$1,000) dollars, which sentences, on motion of each defendant, were stayed.

Thereafter on the fifteenth day of March, 1943, notice of appeal was filed by each defendant and upon motion filed and

allowed by the court the appeals were consolidated in one record. The indictment and all pleadings, motions and exhibits are made a part of this bill of exceptions and may be referred to.

At the trial one Morris Kepnes called as a witness for the Government testified that he was in the wholesale beef business and on the 18th of December, 1942, purchased 2 rumps and rounds of beef of "A" grade weighing 341 pounds from Benjamin Rottenberg, gave a check for \$64.79 which was the amount of the invoice, to the bookkeeper payable to the company and an additional check for \$47.74 payable to cash. This was all the evidence at the trial as to the grade of beef involved in the first counts.

There was evidence upon all the other counts submitted to the jury from which the jury might have found that the allegations set out in each count were sustained by the evidence. The maximum prices as computed under Revised Maximum Price Regulation 169 as amended and submitted to the jury were as follows:

Count 1 — \$42.62 for rumps and rounds or \$85.25 if regarded as hinds.

Count 3 — \$438.03.

Count 4 — \$255.02.

Count 5 — \$82.75.

Count 9 — \$258.88.

Count 10 — \$166.87.

Count 11 — \$229.77.

Count 12 — \$242.65.

Count 14 — \$80.80.

Count 15 — \$145.24.

Count 16 — \$205.75.

Count 17 — \$179.74.

Count 18 — \$36.86.

Count 19 — \$242.36.

Count 20 — \$130.28.

The defendants introduced no testimony except the following offer of proof:

The defendants offered to prove through Sidney H. Rabinovitz, President of Colonial Provision Company of Boston, doing a business of eight (8) million dollars per year, and president and treasurer of Girard Packing Co. of Philadelphia; that he is a director and member of the executive committee of the N. E. Wholesale Meat Dealer's Association and has been serving on committees trying to solve the problem of the New England meat situation with our officials in Washington; that he has been in the wholesale meat business for thirty-six (36) years and is familiar with and follows daily livestock markets and costs of livestock, is familiar with slaughtering and the dressed beef yield of cattle in Boston and market prices and cost to the trade therefor and methods employed in purchasing, processing and marketing livestock; that he is familiar with the grades of livestock used in the Boston market and slaughtered locally and the market prices of the dressed beef therefrom and follows the daily market quotations on dressed beef; that from December 10, 1942, to the early part of February, 1943, the following represents the average market price of livestock purchased at Chicago of the type which would produce the grades of meat specified:

AA (Choice) Steer livestock weight	1200 lbs. @ 16.70	200.40.
AA (Choice) Heifer livestock weight	900 lbs. @ 15.75	141.75.
A (Good) Steer livestock weight	1200 lbs. @ 15.50	186.00.
A (Good) Heifer livestock weight	900 lbs. @ 14.75	132.75.
B (Commercial) Steer livestock weight	1200 lbs. @ 13.50	162.50.
B (Commercial) Heifer livestock weight	900 lbs. @ 12.63	113.67.
B (Commercial) Cows livestock weight	1000 lbs. @ 12.50	125.00.
C (Utility) Cows livestock weight	900 lbs. @ 11.15	100.35.
Cutters and Canners livestock weight	800 lbs. @ 9.58	76.64.

That expenses of commission, insurance, taxes and feeding based on weight of the animal when purchased at .15 per cwt.

That expenses from time animal reaches Boston up to the time it becomes dressed beef include yarding, slaughtering, dressing of the animal and overhead, exclusive of capital investment of the slaughterer, averages 1.00 per cwt.

That from the time of purchase in Chicago until the arrival at Boston the livestock shrinks an average of 5 per cent and freight is paid at Boston on weight after shrinkage at the rate of .56 per cwt.

That from each animal is obtained hides and offal which is deducted from the gross cost of the beef; that these deductions are figured on the weight of the animal at Chicago, the hides being credited@ 1.00 per cwt.
 Offal@ .70 per cwt.
 Slaughter tallow, fat and bones@ .30 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "AA" Steer at Boston Slaughtering Plant is \$195.98

That the average dressed carcass yield of that grade of meat is 59 per cent. of weight of livestock when purchased 708 lbs.

That cost to slaughterer of dressed Carcass is \$27.70 per cwt.
 That cost to slaughterer of dressed Hind is 30.95 per cwt.
 That cost to slaughterer of dressed Fore is 24.75 per cwt.

That adding expenses and deducting credits on the formula outlined the cost the dressed meat of the average "AA" Heifer at Boston Slaughtering Plant is \$138.44

That the average dressed carcass yield of that grade of meat is 57 per cent of weight of livestock when purchased 513 lbs.

That cost to slaughterer of dressed Carcass is \$26.99 per cwt.
 That cost to slaughterer of dressed Hind is 30.25 per cwt.
 That cost to slaughterer of dressed Fore is 24.00 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "A" Steer at Boston Slaughtering Plant is \$181.42

That the average dressed carcass yield of that grade of meat is 57 per cent of weight of livestock when purchased .. 684 lbs.

That cost to slaughterer of dressed Carcass is \$26.52 per cwt.
 That cost to slaughterer of dressed Hind is 29.25 per cwt.
 That cost to slaughterer of dressed Fore is 24.00 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "A" Heifer at Boston Slaughtering Plant is \$129.44

That the average dressed carcass yield of that grade of meat is 55 per cent of weight of livestock when purchased 495 lbs.

That cost to slaughterer of dressed Carcass is \$26.15 per cwt.

That cost to slaughterer of dressed Hind is 28.90 per cwt.

That cost to slaughterer of dressed Fore is 23.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Steer at Boston Slaughtering Plant is \$157.58

That the average dressed carcass yield of that grade of meat is 55 per cent of weight of livestock when purchased 660 lbs.

That cost to slaughterer of dressed Carcass is \$23.88 per cwt.

That cost to slaughterer of dressed Hind is 26.13 per cwt.

That cost to slaughterer of dressed Fore is 21.88 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Heifer at Boston Slaughtering Plant is \$110.36

That the average dressed carcass yield of that grade of meat is 53 per cent of weight of livestock when purchased 477 lbs.

That cost to slaughterer of dressed Carcass is \$23.14 per cwt.

That cost to slaughterer of dressed Hind is 25.39 per cwt.

That cost to slaughterer of dressed Fore is 21.14 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Cow at Boston Slaughtering Plant is \$121.32

That the average dressed carcass yield of that grade of meat is 54 per cent of weight of livestock when purchased 513 lbs.

That cost to slaughterer of dressed Carcass is \$23.65 per cwt.

That cost to slaughterer of dressed Hind is 25.90 per cwt.

That cost to slaughterer of dressed Fore is 21.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "C" Cow at Boston Slaughtering Plant is \$97.04

That the average dressed carcass yield of that grade of meat is 51 per cent of weight of livestock when purchased 459 lbs.

That cost to slaughterer of dressed Carcass is \$21.15 per cwt.

That cost to slaughterer of dressed Hind is 22.90 per cwt.

That cost to slaughterer of dressed Fore is 19.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average Cutter & Canner at Boston Slaughtering Plant is \$73.70

That the average dressed carcass yield of that grade of meat is 44 per cent of weight of livestock when purchased 352 lbs.

That cost to slaughterer of dressed Carcass is \$20.94 per cwt.

That cost to slaughterer of dressed Hind is 20.94 per cwt.

That cost to slaughterer of dressed Fore is 20.94 per cwt.

That to each of the figures representing the cost to the slaughterer of each wholesale beef cut should be added \$1 per cwt. representing a fair and equitable margin of profit to the slaughterer including return on capital investment.

That the foregoing costs as set forth in the schedules and the fair and equitable margin therein established and computed are all based upon a business efficiently managed and conducted and no business, properly managed and efficiently conducted, could sell any of the specified grades of beef or wholesale beef cuts at the maximum prices established by Revised Maximum Price Regulation No. 169 as amended, without losing money on each such sale and no margin of profit or return could be realized upon any such sale.

That the practice is for the slaughterer to sell the beef and wholesale beef cuts to wholesalers to take the beef to their place of business or have it carted there; that the cartage and delivery expense is to be added to the cost by the slaughterer if delivered by him; that from the vehicle at the door of the wholesaler's establishment, luggers carry the beef on their shoulders into the premises where the beef is hung on trolley hooks which roll along monorail overhead tracks into refrigerated chests and is there displayed for sale by the wholesaler. That there is a shrink

averaging 1 per cent between the time the beef is purchased from the slaughterer until it is resold by the wholesaler.

That he knows the defendant Rottenberg for twenty odd years and knows him to have been in the wholesale beef business for at least twenty years, that he is familiar with the type of business done by the defendant and knows that he handles and sells beef which is slaughtered locally at Boston; that the defendant conducts a small business in an experienced and efficient manner. That the minimum fair and equitable margin or return to a wholesaler similar to the defendant conducting an efficiently managed business would be approximately seven per cent (7%) of the gross sales or one and one-half dollars (\$1.50) per hundredweight added to the cost of beef and wholesale beef cuts delivered at the door of the wholesaler, provided the wholesaler were able to procure and sell thirty thousand (30,000) pounds of beef per week. That unless this tonnage were maintained, a wholesaler of this class would show no net return on sales based upon the figures here outlined as a fair and equitable margin because expenses would exceed the amount of gross return from sales.

That under present conditions in the City of Boston, it is difficult for wholesalers of the type of the defendant to procure thirty thousand (30,000) pounds of beef per week.

That under Revised Maximum Price Regulation No. 169 as amended, the wholesaler is afforded no more than seventy-five cents (\$.75) per hundredweight in any event and no wholesaler of the class of the defendant, even under normal conditions, could efficiently continue in business without losing money on that margin of gross return and under present conditions with restricted operations, a substantial loss must result to every such wholesaler no matter how efficiently his business is conducted.

That under the provisions of said Revised Maximum Price Regulation No. 169 as amended, if one wholesaler sells to another wholesaler the seventy-five cents (\$.75) per hundredweight referred to is reduced by fifty (\$.50) cents thereby only leaving wholesaler number one a gross return of twenty-five cents (\$.25)

per hundredweight. On a transaction of this nature wholesaler number one selling to wholesaler number two, incurs the following items of expense:

- a. The cost of carting from the slaughterer to the wholesaler's place of business amounting to approximately twenty-five cents (\$.25) per hundredweight.
- b. The expense of lugging from the wagon at the door of the wholesaler's establishment into his premises and out again to the second wholesaler's wagon or truck, the average charge for which is 20 cents per beef quarter.
- c. 1 per cent shrink from time of purchase from slaughterer until delivered by first wholesaler to second wholesaler.
- d. The normal items of overhead and doing business, *i.e.*, salaries, rent, refrigeration, electrical costs, telephone, paper, burlaps, skewers, insurance, interest on loans, taxes, corporation expenses of filing returns and fees thereon, bad debts and depreciation.

Transactions between wholesaler number one and wholesaler number two must definitely result in a loss to the seller if he sells at the price established as the maximum by Revised Maximum Price Regulation No. 169 as amended, no matter how efficiently wholesaler number one conducts his business.

That the above proffer was made in the absence of the jury for the purpose of showing that Revised Maximum Price Regulation No. 169 as amended is arbitrary, capricious and contrary to the defense which the defendants would be able to show and is a denial therefore and violation of the rights of the defendants under the Fifth Amendment of the Constitution and their liberty and property guaranteed thereunder.

The court declined to receive the offer of proof on the ground that Section 204 of the Emergency Price Control Act of 1942 deprived the United States District Court of jurisdiction to entertain defense. The defendants duly saved exceptions to the court's declination of said offer of proof.

The foregoing is all the evidence material to the questions of law raised by these exceptions.

At the close of the evidence as hereinbefore stated the defendants requested the court to instruct the jury on rulings of law as follows:

17. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is unreasonable.

18. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is arbitrary.

19. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is invalid.

20. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is illegal.

21. That Emergency Price Control Act of 1942 as amended, as a matter of law, is arbitrary.

22. That Emergency Price Control Act of 1942 as amended, as a matter of law, is unreasonable.

23. That Emergency Price Control Act of 1942 as amended, as a matter of law, is invalid.

24. That Emergency Price Control Act of 1942 as amended, as a matter of law, is illegal.

25. That as a matter of law the Act of Congress, known as the Emergency Price Control Act of 1942 as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

26. As a matter of law the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act, it seeks to establish legislation founded upon indefinite or indeterminable standards, which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to

support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

27. As a matter of law the Act of Congress known as the Emergency Price Control Act of 1942, is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

28. As a matter of law the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

29. As a matter of law Revised Maximum Price Regulation No. 169, as amended, is unjust and unreasonable and, therefore, invalid under the Constitution of the United States of America and more particularly, under Article I, Section 1 thereof and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcasses and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

30. As a matter of law, the Regulation upon which the indictment and each count thereof is predicated, is dependent upon

determinations of fact, which determinations are not shown as required by law.

31. As a matter of law, where it does not appear from any act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each count therein that he has given consideration as required by the Amendment to the Emergency Price Control Act, Acts of Congress, October 2, 1942, to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing, then Section 1364.451 is invalid in whole or in part by reason of the failure of the price administrator to so consider.

32. As a matter of law, the Emergency Price Control Act of 1942, (Public Law No. 421, 77th Congress) insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid act, is void because of unconstitutional delegation of legislative power.

33. As a matter of law, the Section 2 (a) Emergency Price Control Act (Public Law 421—77th Congress) requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provision of this sub-section Section 2 (a) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order". And it appearing as a requirement of law that such regulation, order or consideration shall be filed with the Division of the Federal Register and it further appears from the provisions of Revised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said regulation were filed with the Division of the Federal Register and, by the provisions of the Act of Congress October 2, 1942 it is required that Section 3 (2) "in the fixing of maximum prices on products resulting from the

processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing"; Provided further, "That in fixing maximum prices for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity as provided in this Act adequate weighting shall be given to farm labor". And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

1st—A generally fair and equitable margin for processing an agricultural commodity including livestock; and

2nd—Adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in whole or in part to so consider.

The court charged the jury as follows:

Mr. Foreman and Gentlemen of the Jury. This is the first criminal case to arise, at least in this District, if not anywhere, under the Emergency Price Control Act of 1942. You will have to consider the case or cases of two separate defendants, the first Benjamin Rottenberg Company, Inc., which I shall hereafter refer to as the corporation, and the other the case of Benjamin Rottenberg personally. At the outset of this case, the indictments upon which the case were founded presented twenty counts against the corporation and twenty counts against Benjamin Rottenberg personally. In order to abbreviate the case and in the light of the proof, you are going to be required to pass upon only fifteen counts in connection with the corporation and fourteen in connection with Mr. Rottenberg personally. I am going to direct a verdict for the corporate defendants on five counts and I am going to direct a verdict for Mr. Rottenberg personally on six counts. Now, you ought to consider each defendant's case separately and you ought to consider each count separately. Each count refers to a different transaction and do not neglect carefully to analyze each separate count and each defendant's case

apart from the other defendant's case. Speaking generally, the indictments charged the corporate defendant and the individual defendant as having wilfully violated Section 4 (a) of the Emergency Price Control Act by having sold and delivered on different occasions beef at different prices higher than the ceiling prices established under the General Maximum Price Regulation Number 169 as amended, issued on the tenth day of December last.

This is a criminal case, and in a criminal case, the Government must persuade you beyond a reasonable doubt that its charge is correct. On each count the Government has that burden. Every count you must ask yourself, whether or not that count is so sustained that you can beyond a reasonable doubt convict the defendant. You will have no occasion in this case to consider whether the statute, that is to say, the Emergency Price Control Act, is or is not constitutional or otherwise valid. You will have no occasion in this case to consider whether the Regulation, the General Maximum Price Regulation Number 169, is or is not valid. You ought to consider only whether the prices which I shall shortly tell you about were exceeded wilfully by the corporate defendant and were exceeded wilfully by the individual defendant. Both the corporate defendant and the individual defendant have the benefit of a presumption of innocence. It is not quite correct to say as has been intimated to you that nobody challenges the facts in this case. The defendants by their pleas of "not guilty" have challenged, have necessarily challenged the Government on the facts as well as the law and their challenge is as effective as a plea of "not guilty" as it could be in any other way. Now it will at once appear to you that the difficult question of law in this case turns on the word, "wilfully". When does a corporataion "wilfully" violate a statute? Of course, a corporation is not an individual. A corporation is a theoretical entity, something that is an abstract. A corporation has to act through individuals. The question is whether the individuals acting for the corporation acted wilfully. If they acted wilfully, then their actions imputed to the corporation. Now, what does wilfully mean? As used in this

statute wilfully means knowingly or with a careless indifference as to what the facts are, acting without even endeavoring to find out what the situation is. You have undoubtedly at various times heard the maxim that everyone is presumed to know the law. That maxim may mislead you in this case. In this particular type of case, you must find that those who acted for the corporation acted knowing of the Regulation or deliberately choosing to remain in ignorance of the Regulation. Now, I have explained to you that a corporation can be found to have wilfully violated a statute if one of its agents acting for it acted wilfully and in this case, there are two agents who are alleged to have acted for the corporation and you can find the knowledge on the part of Mr. Miller, if he had such knowledge, is to be imputed to the corporation and you can find that Mr. Rottenberg if he had such knowledge had knowledge which can be imputed to the corporation. Indeed, if you find that Mr. Miller while acting for the corporation acted wilfully in violation of the Regulation, it necessarily follows that the corporation violated the Regulation wilfully and if you find that Mr. Rottenberg wilfully violated the Regulation acting for the corporation, it necessarily follows that the corporation itself wilfully violated the Regulation. Now I ought to say something to you about wilful violation in connection with Mr. Rottenberg. Mr. Rottenberg was, as the United States attorney has pointed out, president and treasurer and undoubtedly a large stockholder in the corporation. The mere fact that a man is an officer, director or stockholder of a corporation which commits a crime does not mean that he himself has committed a crime. The critical question is whether he used the corporation as an instrument or device for committing a crime. If he used the corporation as a means of wilfully violating the statute, he would be personally liable. The question does not turn on whether or not he was merely an officer or stockholder but, was he the sort of officer or stockholder who used the corporation as the instrument for the accomplishment of a wilful violation of the statute?

Now, I have said to you that you must look at each of the

counts charged separately. Each of the counts charges a wilful violation of the Act through a sale and delivery of certain specified types of meat at certain prices. Now, I have said that I am going to allow you to consider a total of fourteen counts or if you please, fourteen transactions in which Mr. Rottenberg personally is charged and fifteen counts or transactions in which the corporation is charged. Four of those counts relate to transactions as to which Mr. Scappini testified on Wednesday, four of them are counts as to which Mr. Kepnes testified sometime on Wednesday and yesterday. Six of the counts which I will allow you to consider in the case of Mr. Rottenberg personally and seven of those which I will allow you to consider in the case of the corporation, refer to transactions, acts as to which Mr. Gordon testified. Now the transactions as to which Mr. Scappini testified occurred on January 2, January 5 and January 14 and 19th. Those as to which Mr. Kepnes testified occurred on December 18, January 7, January 14 and January 15. Those as to which Mr. Gordon testified include those transactions on December 24, December 28, January 2, January 4, January 7 and January 8, and in the case of the corporation also the transaction of December 17. Now when I say that those transactions occurred on that date, I did not mean to say that you must find that they occurred on that date. If I had spoken to you somewhat more clearly, I would have said that these are the dates on which the witnesses allege that the transactions occurred. Now you will recall that each of these three witnesses, Mr. Scappini, Mr. Kepnes and Mr. Gordon testified that on some of the transactions but not all of them, Mr. Rottenberg actually participated in the transactions. Mr. Scappini testified that on the transaction of January 5 and January 14 Mr. Rottenberg individually participated. Mr. Kepnes testified that on the transaction of December 17, Mr. Rottenberg participated. Mr. Gordon testified that on December 24 Mr. Rottenberg personally participated. Now, I do not mean to imply that Mr. Rottenberg could be found guilty only on the transactions on which he personally participated. He may have

made it plain or he may not have made it plain, it is up to you to decide, that the acts taken by the corporation in connection with these matters and the acts taken by Mr. Miller, were taken on his behalf and that he directed it or acquiesced to it. You will have to decide for yourselves as to whether or not Mr. Rottenberg participated in any transaction that was unlawful, whether he did so wilfully and if so what were those transactions. Now, I hope that you will examine carefully count by count the indictments as they go to you. You will have with you in the jury room the indictments covering the cases of the two defendants who are now on trial, Benjamin Rottenberg Co., Inc., Benjamin Rottenberg personally. You will also have in your jury room all the exhibits in this case including an exhibit which will be numbered (E) which will show what both the defendants and the Government agree are the correct ceiling prices for each of the transactions which is covered by the count that you are to consider. Merely for the purposes of the record and without any thought that any one of you will remember these ceiling prices, I am going to read what the ceiling prices for each of the counts was and you will have an actual list in your jury room repeating exactly what I am now saying.

In count 1, the ceiling price was \$42.62 for rumps and rounds or \$85.25 for hinds; in count 3, the ceiling price was \$438.03; in count 4, the ceiling price was \$255.02; in count 5 the ceiling price was \$82.75; in count 9 the ceiling price was \$258.88; in count 10 the ceiling price was \$166.87; in count 11 the ceiling price was \$229.77; in count 12 the ceiling price was \$242.65; in count 14 the ceiling price was \$80.80; in count 15 the ceiling price was \$145.24; in count 16 the ceiling price was \$205.75; in count 17 the ceiling price was \$179.74; in count 18 the ceiling price was \$36.86; in count 19 the ceiling price was \$242.36; count 20 the ceiling price was \$130.28.

Now, before I conclude I should like to ask counsel if they have anything to which they want to call my attention.

Mr. Foreman, Gentlemen, the counsels for the defense and the Government have drawn to my attention certain points which they would like me to call to your attention. In the first place, I indicated that Mr. Rottenberg was a large stockholder in the corporation. There is no evidence one way or the other as to how large a stockholder he is. The question is whether he really wilfully, through the use of the corporate device, violated the regulation and you can take into account the conversations which were testified to, or you can ignore them if you please. The question of fact is for you. Now the parties have drawn to my attention the fact that some of the transactions involve one invoice and two checks and some involve one invoice, one check and one cash payment. Particularly the transactions to which Mr. Gordon testified this morning were of the latter type. Now if you, when you get to the jury room find that there are not two checks for each transaction, you are entitled to take into account the testimony which explained the fact that there was one check and one invoice. I am not suggesting that you are bound to believe any one of the invoices. You can disbelieve all of them if you please to do so. Now it also has been called to my attention with respect to the first transaction that Mr. Scappini discussed with his testimony, the transaction covered in count number 1, the defendants claim that there are other invoices besides the invoice which was introduced by the Government as an exhibit and those other invoices account for a substantial part of the discrepancy when the checks were passed from Mr. Scappini to the corporation and the invoice which the Government offered. You may or may not believe that. That is a question for you gentlemen. I would not want to give you the impression by saying that that you are free to believe that you can act in careless disregard of your oath. You are sworn to do justice in this case and not to act capriciously but you have a reasonable latitude in determining for yourselves the credibility of the witnesses. You are entitled to weigh the facts and if you apply the law that I have given you, the facts as you have heard them throughout the case, you will remember that this

being a criminal proceeding, the Government has the burden of proof and that if your mind is in equilibrium so that you cannot decide whether there is innocence or guilt, you are bound under those circumstances to turn the verdict for the defendant. But of course, the duty of the Government does not go beyond proving their case beyond a reasonable doubt. You are to bear in mind that rule. Now when you retire, to the jury room to consider your verdict, you will realize that you are engaged in one of the most solemn undertakings which any man can be called upon to perform in civil life, the trial of a person for a serious crime. As I have indicated to you, you will have to return a verdict on some of the items for the defendants. I shall direct you now to return a verdict for the corporate defendant on counts 2, 6, 7, 8 and 13, and for the individual defendant on counts 2, 6, 7, 8, 13, and 14. As to the other counts, you will consider them and return your verdict acting as I suppose you all know, unanimously. No conviction can be based on less than a unanimous vote but each count is to be considered separately, Mr. Foreman, and you will be supplied by the clerk with the list of counts on which I have directed verdicts for the defendants, and you will take into consideration only the other counts, and you will proceed count by count making certain to apply the rule of burden of proof as I have indicated.

Also in order to avoid any question, let me repeat that Exhibit 2(e) one list of prices which I will give you to take to the jury room are ceiling prices, that is to say, they are the maximum prices which may lawfully have been charged under Regulation Number 169, as amended. And I cannot see how there can be any confusion to the point, since the list was prepared by the Government and starts with the words, "ceiling price". They seem to think I have not made that clear, and so I repeat it. Now I also want your attention to one fact which the defendants have requested me to draw to your attention. Mr. Rottenberg did not personally take the stand. He is not required to do so. And I am

by statute and decision required to call to your attention the fact when requested to call it to your attention, that his failure to take the stand is not to be construed against him. Is there anything else?

Mr. MacCarthy: Nothing else, your Honor.

Mr. Bacchus: Nothing else.

On March 10, 1943, before sentence, the defendants presented motions for a new trial and offered to show from statements made by the price administrator that Revised Maximum Price Regulation No. 169 as amended did not follow the provisions of Emergency Price Control Act of 1942 as amended, were unreasonable and arbitrary and, therefore, might be regarded as violating due process of law. The court denied the motions for a new trial on the ground that the Emergency Price Control Act of 1942 prevents the court from considering the alleged invalidity of a regulation. The defendants duly claimed exceptions to the rejection of the offer and the denial of said motions.

The defendants being aggrieved by the denial of each of their motions to quash the indictment as a whole and to each count thereof, the denial of each amended motion to quash the indictment by the admission of evidence and the exclusion of their offer of proof and other evidence, by the denial of their motion to dismiss count 1 on the ground of variance, by the rulings and refusals to rule as requested, by the denial of their motions in arrest of judgment and motions for a new trial, now present this, their bill of exceptions, and pray that the same may be allowed.

BENJAMIN ROTTENBERG,

B. ROTTENBERG CO., INC.,

by their Attorneys,

LEONARD PORETSKY,

JOHN H. BACKUS,

WILLIAM H. LEWIS.

On the same day the foregoing bill of exceptions is allowed, by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting.

DEFENDANT'S NOTICE OF APPEAL

[Filed March 15, 1943.]

Name and address of defendant-appellant:

Benjamin Rottenberg, 78 Wallingford Road, Brighton, Mass.

Name and address of defendant-appellant's attorneys:

William H. Lewis, Esquire, 294 Washington St., Boston, Mass.

John H. Backus, Esquire and Leonard Poretsky, Esquire, 6 Beacon Street, Boston, Mass.

Offense:

Willfully, unlawfully and knowingly violating Section (4A) of the Emergency Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of judgment:

March 10, 1943.

Brief description of judgment or sentence:

The defendant-appellant was sentenced to confinement for six months in such institution as the Attorney-General of the United States shall designate, and to pay a fine of (\$1,000) one thousand dollars.

Upon application by defendant-appellant, defendant-appellant was admitted to bail pending his appeal to the United States Circuit Court of Appeals for the First Circuit, from the judgment of conviction herein.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the First Circuit from the judgment above-mentioned on the grounds set forth below.

Dated at Boston, Massachusetts this fifteenth day of March, 1943.

BENJAMIN ROTTENBERG,
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,

Attorneys for Defendant-Appellant.

GROUNDS OF APPEAL: The defendant-appellant alleges the court erred in the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

(a) In admitting into evidence a series of checks payable to the order of cash without any evidence that the checks or proceeds thereof went through the hands of the defendant-appellant.

(b) By denying the defendant-appellant the right to introduce evidence tending to show that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

(c) By rejecting the offer of proof of defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's renewal of amended motion to quash the indictment.

5. The court erred in denying the defendant-appellant's motion to direct a verdict on count 1 of the indictment on the ground of variance.

6. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19 and 20 of the indictment.

7. The court erred in denying the defendant-appellant's request for rulings numbered 17 to 33, inclusive.

8. The court erred in denying the defendant-appellant's motion in arrest of judgment.

9. The court erred in denying the defendant-appellant's motion for a new trial on the ground of newly discovered evidence.

10. The appeal will be based on additional errors set forth in detail in the assignment of errors.

UNITED STATES OF AMERICA

DISTRICT OF MASSACHUSETTS, SS.

Boston, Mass., March 15, 1943.

Pursuant hereunto, I have this day served on Edmund J. Brandon, United States Attorney, at Boston, in said district, a true and attested copy of this notice of appeal in hand at 3:00 P.M.E.W.T.

J. HENRY GOGUEN, *U. S. Marshal*,

By JOHN J. HARVEY,

Deputy U. S. Marshal.

[Ret'd into court 3/17/43.]

ASSIGNMENT OF ERRORS.

[Filed in No. 16074 and 16075 on May 6, 1943.]

The defendants-appellants allege that the court below erred in its orders, decrees, rulings and instructions and assign as errors the following:

1. The court erred in denying the defendants-appellants' motion to quash the indictment.

2. The court erred in denying the defendants-appellants' amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendants-appellants objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

(a) In ruling that the defendants-appellants had no right

to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended is arbitrary and capricious.

(b) In rejecting the offer of proof of the defendants-appellants in substantiation of their claim that Revised Maximum Price Regulation No. 169 as amended is arbitrary and capricious.

4. The court erred in denying the defendants-appellants' motion to direct a verdict on count 1 of the indictment on the ground of variance.

5. The court erred in denying the defendants-appellants' requests for rulings numbered 17 to 33 inclusive as more specifically set forth in the bill of exceptions.

6. The court erred in denying the defendants-appellants' motion in arrest of judgment.

7. The court erred in denying the defendants-appellants' motion for a new trial on the ground of newly-discovered evidence.

BENJAMIN ROTTENBERG,

B. ROTTENBERG CO., INC.,

by their Attorneys,

WILLIAM H. LEWIS,

JOHN H. BACKUS,

LEONARD PORETSKY.

No 16075, CRIMINAL,

THE UNITED STATES, BY INDICTMENT,

v.

B. ROTTENBERG CO., INC.

The indictment in this cause is presented by the grand jury at the present December Term of this court, 1942, when on February 24, 1943, the Honorable George C. Sweeney, District Judge, sitting, the said defendant, B. Rottenberg Co., Inc., a corporation, is set to the bar, and the reading of the indictment being waived, says by Benjamin Rottenberg, its president and attorney-in-fact, that there of the corporation is not guilty.

At the same term the defendant on March 1, 1943, files a motion to quash the indictment, which on the same day comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and after argument thereon is denied.

At the same term on March 3, 1943, the defendant files a motion to amend his motion to quash, which on the same day comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and is denied if the court has jurisdiction so to do.

On the same day, it is ordered by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, that this indictment and indictment No. 16074, United States v. B. Rottenberg, be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and a jury is duly empanelled and sworn to try the issue, videlicet, Benjamin Knudson, Jr., Foreman, Milford F. Daniels, Eugene T. Ricketson, Don Allen Rogers, Thomas P. Smith, William H. Manning, G. Lane Goss, John A. McGowan, Frank B. Howland, Charles F. Breed, Thomas R. Brown, Thomas C. Hoover.

This cause, together with cause numbered 16074 comes on for trial on the pleadings and evidence on the third, fourth, and fifth days of March, 1943.

On the fifth day of March, 1943, at the close of the evidence, the defendant renews its motion to quash the indictment and its amendment thereof, and upon consideration the motion is denied by the court.

On the same day the defendant files a motion for directed verdict on counts 1 and 2 of the indictment on the ground of variance, which the court grants as to count 2 of the indictment and denies as to count 1.

On the same day defendant files a motion for directed verdict on all of the counts of the indictment, which is granted as to counts 2, 6, 7, 8, and 13, and denied as to the remaining counts.

This cause is thereupon committed to the jury, who, after hearing all matters and things concerning the same, return their verdict therein and upon oath say that thereof the defendant is guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20, and that by direction of the court upon counts 2, 6, 7, 8, and 13 the defendant is not guilty.

Thereupon, on March 9, 1943, the defendant files a motion in arrest of judgment, which the court, on March 10, 1943, after hearing denies. On said March 10, the defendant files a motion for new trial which the court, after consideration, denies. On the same day the following Judgment is entered:

JUDGMENT.

March 10, 1943.

On this tenth day of March, 1943, came the United States Attorney, and the defendant B. Rottenberg Co. Inc., a corporation appearing in proper person, and by Benjamin Rottenberg, its president, and by counsel, and,

The defendants having been convicted on verdict of guilty of the offense charged in counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20 in the indictment in the above-entitled cause, to wit: Violation of Revised Maximum Price Regulation No. 169, as amended, of the Emergency Price Control Act of 1942, as amended (Public Law 421, 77th Congress), approved January 30,

1942; it is by the court ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby sentenced to pay a fine of one thousand (1000) dollars.

CHARLES E. WYZANSKI, JR., *Judge.*

[Pursuant to stipulation, the indictment, the defendant's motion to quash, the defendant's motion to amend the motion to quash, the defendant's motion for directed verdict as to counts 1 and 2 on the ground of variance, the defendant's motion in arrest of judgment, and the defendant's motion for new trial are not here reproduced, as the indictment and the several motions are of like effect as those in Criminal No. 16074. One bill of exceptions and one assignment of errors were filed, entitled in both Criminal 16074 and 16075. They are reproduced in the record in Criminal 16074. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S NOTICE OF APPEAL

[Filed March 15, 1943.]

Name and Address of Defendant-appellant:

B. Rottenberg Co. Inc., 111 Blackstone St., Boston, Mass.

Name and Address of Defendant-appellant's attorneys:

William H. Lewis, Esquire, 294 Washington St., Boston, Mass.

John H. Backus, Esquire and Leonard Poretsky, Esquire,

6 Beacon Street, Boston, Mass.

Offense:

Wilfully, unlawfully and knowingly violating Section (4A) of the Emergency Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of judgment:

March 10, 1943.

Brief description of judgment or sentence:

The defendant-appellant was sentenced to pay a fine of one thousand dollars (\$1,000).

Upon application by defendant-appellant, execution of sentence was stayed pending its appeal to the United States Circuit Court of Appeals for the First Circuit, from the judgment of conviction herein.

The above-named defendant-appellant corporation hereby appeals to the United States Circuit Court of Appeals for the First Circuit, from the judgment above-mentioned on the grounds set forth below.

Dated at Boston, Massachusetts this fifteenth day of March, 1943.

B. ROTTENBERG CO. INC.,

by BENJAMIN ROTTENBERG, President.

LEONARD PORETSKY,

JOHN H. BACKUS,

WILLIAM H. LEWIS,

Attorneys for Defendant-Appellant.

GROUND OF APPEAL: The defendant-appellant alleges the court erred in the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment:

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause; and the specific evidence and the objections thereto are as follows, to wit:

(a) By denying the defendant-appellant the right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

(b) By rejecting the offer of proof of defendant-appellant in substantiation of its claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's renewal of amended motion to quash the indictment.

5. The court erred in denying the defendant-appellant's motion to direct a verdict on count 1 of the indictment on the ground of variance.

6. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20 of the indictment.

7. The court erred in denying the defendant-appellant's request for rulings numbered 17 to 33 inclusive.

8. The court erred in denying the defendant-appellant's motion in arrest of judgment.

9. The court erred in denying the defendant-appellant's motion for a new trial on the ground of newly discovered evidence.

10. The appeal will be based on additional errors set forth in detail in the assignment of errors.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, SS.

Boston, Mass., March 15, 1943.

Pursuant hereunto, I have this day served on Edmund J. Brandon, United States Attorney, at Boston, in said district, a true and attested copy of this notice of appeal in hand at 3:00 P.M. E.W.T.

J. HENRY GOGUEN, *U. S. Marshal,*

by JOHN J. HARVEY,

Deputy U. S. Marshal.

Ret. into court 3/17/43.

STIPULATION.

[Filed May 7, 1943.]

Whereas the pleadings and motions filed in the above-captioned cause are duplications of those filed in United States v. Benjamin Rottenberg, No. 16074 of this court, it is hereby agreed

and stipulated that such pleadings and motions as are herein enumerated and filed in No. 16074 shall have equal application to this defendant upon its appeal and there need not be printed in the record the following pleadings and motions of this defendant:

- (a) The indictment;
- (b) Defendant's motion to quash;
- (c) Defendant's amendment to motion to quash;
- (d) Motion for directed verdict of not guilty as to counts 1 and 2 on ground of variance;
- (e) Motion in arrest of judgment;
- (f) Motion for new trial;
- (g) Opinion in *United States v. Slobodkin et al.* and *United States v. B. Rottenberg Co. Inc. et al.*, Criminal Nos. 16058, 16059 and 16063.

EDMUND J. BRANDON,

United States Attorney.

WM. H. LEWIS, L.P.,

JOHN H. BACKUS, L.P.,

LEONARD PORETSKY, L.P.,

Counsel for the Defendant.

ORDER OF CIRCUIT COURT OF APPEALS CONSOLIDATING CRIMINAL 16074 AND CRIMINAL 16075.

March 26, 1943.

Upon motion, It is ordered that the appeal herein be consolidated and docketed as a single case.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Memorandum.

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DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS.

Criminal No. 16058.

United States *v.* Jacob Slobodkin.

Criminal No. 16059.

United States *v.* J. Slobodkin Co.

Criminal No. 16063.

• United States *v.* B. Rottenberg Co. Inc. et al.

MEMORANDUM

March 2, 1943.

WYZANSKI, D.J.

Criminal No. 16058.

In United States *v.* Jacob Slobodkin, Criminal No. 16058, paragraph 1 of the defendant's motion to quash raises the objection that the indictment is vague. That objection is overruled because the court finds the indictment sufficiently certain. Paragraphs 2 through 5 of the defendant's motion allege that the Emergency Price Control Act of 1942 itself, (not, be it observed, any specific regulation thereunder) is invalid under the United States Constitution for these reasons: in violation of Article I of the United States Constitution, Congress delegated legislative power to the Price Administrator (§ 2); in violation of Amendment V, the Act deprives the defendant of his property and interferes with his liberty of contract (§ 3); and, in violation of Amendment V, the Act deprives the defendant of his liberty and his property by authorizing this court to impose a sentence of imprisonment and fines without permitting the defendant to question in this court the validity of the Act and the regulations thereunder (§ 4 and 5). The points made in paragraphs 2 and 3 are overruled for these reasons: first, no one denies that this court in passing upon an indictment laid under the Emergency Price Control Act has the power to consider the validity of such statutory provisions as are applied in the indictment; and second, having the power to pass upon the validity of the statutory pro-

visions here applied, this court concludes that, upon the showing so far made by the defendant, those provisions do not delegate legislative power in violation of Article I of the United States Constitution and do not regulate property or contracts in violation of Amendment V. As to the points made in paragraphs 4 and 5 they are overruled on the ground that they are moot. This court has not been presented with an issue as to the validity of any regulation. Accordingly, *the motion to quash the indictment is denied*. There is no need at this time to consider the defendant's motion to suppress evidence.

Criminal No. 16059.

In *United States v. J. Slobodkin Company*, Criminal No. 16059, the corporate defendant's motion to quash differs from the individual defendant's motion in Criminal No. 16058 only by omitting any allegation of a possible unlawful imprisonment. *The motion to quash the indictment is denied*.

Criminal No. 16063.

In *United States v. B. Rottenberg Co., Inc. et al.*, Criminal No. 16063, the defendants have filed pleas in abatement and a motion to quash.

Although paragraph 4 of the corporation's plea in abatement refers to certain prices as being "unfair and inequitable", the pleas do not point with particularity to any alleged constitutional or statutory infirmity of any regulation of the price administrator. Instead, the pleas place particular emphasis on the two points (1) that the indictments lack the allegation that the overt act occurred in the United States and (2) that the pleaders acquired immunity from prosecution when the corporate records were, in compliance with a subpoena, produced before the grand jury. Both the first (*Daily v. United States*, 152 U.S. 539, 547; *Hyde v. Shine*, 199 U.S. 66, 77) and second (*Wilson v. United States*, 221 U.S. 361, 372-374) points are without merit. *The several pleas in abatement are overruled*.

The motion to quash is a prolix document which in twenty-five

numbered paragraphs challenges the indictment principally on the grounds that (1) it does not set forth sufficient facts to charge a crime or to apprise the defendant of the crime, if any, with which he is charged (§§ 1-3, 17-25); (2) it sets forth more than one crime in one count (§§ 5-6); (3) the Emergency Price Control Act of 1942 upon which the indictment is based is invalid because it delegates legislative power in violation of Article I of the United States Constitution (§§ 7-8, 16); and (4) the regulations upon which the indictment is based are invalid because they are exercises of legislative power, are penal in nature, are unsupported by necessary determinations of fact, and were formulated by methods of procedure which violated the Fifth Amendment (§§ 9-15). The first two grounds were disposed of from the bench during argument and the third ground falls for the reason set forth in *Slobodkin's case, supra*. The fourth ground challenges, albeit not concisely or with precision, the regulation on which the indictment is based. Thus the defendants have moved to quash the indictment on the ground that it is founded upon a regulation which, in view of the circumstances of its adoption (and perhaps they also mean in view of the circumstances of its application,) is invalid under the Emergency Price Control Act of 1942 and is invalid under the due process clause of the Fifth Amendment to the Constitution. The Government has replied that under § 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 31, U.S.C. Ti. 50 § 924 (d), this court is without jurisdiction at any stage in these proceedings to entertain a defense based on an asserted statutory or constitutional invalidity of the regulation.

There is a short answer to this fourth challenge. The defendant's motion to quash is the equivalent of a demurrer. It is not and could not be supported by evidence. It merely tests the indictment, the underlying regulation and the underlying statute as each of them appears upon its face. It follows that under ordinary principles of pleading and criminal procedure, and leaving aside any question of § 204 (d), the defendants

cannot succeed on the fourth ground of their motion unless such parts of Revised Maximum Price Regulation No. 169 [C.C.H. War Law Service ¶ 43,369] as underlie the indictment are invalid upon their face, apart from extrinsic considerations such as the procedure which the administrator followed in formulating the regulation, the evidence upon which he acted, the arbitrary or lack of arbitrary quality of the regulation in the light of the surrounding circumstances of the industry, and the arbitrary or lack of arbitrary quality of the application of the regulation to these defendants. Viewed in this limited aspect, the fourth ground of the defendants' motion is plainly without merit. On its face the regulation complies with all statutory and constitutional requirements. If there be defects in the regulation they are not patent. Accordingly, they are not susceptible of determination on a demurrer or motion to quash.

The defendants, however, have indicated that they intend in the course of the trial to present evidence to show that the administrator acted capriciously in formulating the regulation and that the regulation is capricious in its application to the defendants, and so on both counts violates the due process clause of the Fifth Amendment. If this is the position that the defendants take they, of course, must make a proffer of testimony at the trial when I shall rule upon it. Nothing that I say herein excuses them from that procedural step.

Without excusing such proffer, and solely in connection with the motion now pending before me, I should add that my conclusion adverse to the defendants, on the fourth ground of their motion, rests not only on the short answer already given but also on § 204 (d) of the Emergency Price Control Act. In connection with this latter and alternative basis for my conclusion I have considered two questions: whether § 204 (d) purports to go so far as the Government contends; and if so, whether it violates the Fifth Amendment. Since the case is ready for trial, I shall merely state my reasons briefly without seeking to document my opinion with the usual citations.

The initial question is one of statutory construction. Unfortu-

nately I have not in the 24 hours available to me had access to the legislative history, including committee reports and Congressional debates except as summarized in Note 55 Harv. L. Rev. 477, 492-493. I therefore, am able now to consider only the text of the Act. It shows that criminal prosecutions are provided for in one section, and review of administrative orders in another section. It is in the latter section that there appears sub-section 204 (d) upon which the Government's argument is based. No one would deny that that subsection purports to preclude a United States District Court from entertaining a suit in equity to set aside a regulation. The draftsman has used apt and familiar words from the Chancellor's vocabulary, "to stay, restrain, enjoin or set aside". But since he has not used any terms peculiar to criminal procedure, it might be argued that criminal cases were not within the ban. However, the statement in the Act is unusually broad. It is provided that no District Court "shall have jurisdiction or power to consider the validity of any regulation". Even though, strictly speaking, in a criminal case the District Court never considers the validity of a regulation, but merely the validity of the indictment founded upon the regulation, the language seems to include a criminal prosecution. This is clearer when it is recalled that, strictly speaking, in a suit in equity the Chancellor considers not the validity of a regulation, but the validity of its application to the complainant. Therefore, I conclude that the statute purports to preclude this court from considering the statutory and constitutional validity of a regulation under the Act; and I must next consider whether such a statute is constitutional.

The constitutional question is whether it comports with the due process guarantee of the Fifth Amendment for Congress to provide that in a criminal prosecution for violation of a regulation under the Emergency Price Control Act of 1942 the defendant may not be heard on the issue of the statutory and constitutional validity of that regulation.

In approaching this question it is important to distinguish two different types of asserted invalidity. A regulation might, in form

or in substance, be invalid on its face; or, though fair on its face, it might be invalid because of the circumstances of its adoption or application. This distinction is familiar in the area of administrative law. *Smith v. Caboon*, 283 U.S. 353, 362; *Lovell v. Griffin*, 303 U.S. 444, 452-453. Illustrative of the former type of invalidity would be a regulation establishing different prices for persons of white than for persons of black color; or a regulation which, though it recited compliance with the Act, in fact governed a subject, such as an income tax, obviously foreign to the Act. Illustrative of the latter type of invalidity would be a regulation fair on its face but adopted without whatever procedural formalities may be requisite; or a regulation establishing classifications which in view of the surrounding circumstances are arbitrary and capricious.

In the case at bar the underlying regulation is plainly not infected with the first type of invalidity. It is therefore necessary for me to consider only whether it is unconstitutional to preclude the defendants from raising in a criminal prosecution the issue that the regulation for the violation of which they are prosecuted is, though fair on its face, invalid because of the circumstances under which it was adopted and has been applied to them.

Before discussing that point it is important to observe that the Emergency Price Control Act of 1942 provides in §§ 203 and 204, 56 Stat. 31, U.S.C. Ti. 50 § 923 and 924, that any person subject to any provision of a maximum price regulation may file a protest with the administrator within 60 days after issuance of the regulation (or later if the grounds of protest arose thereafter), and may, in the event of a determination unfavorable to him, seek review by the Emergency Court of Appeals and, on certiorari, by the Supreme Court of the United States.

The indictment charges these defendants with having engaged in violations of Revised Price Regulation No. 169 within 60 days of December 10, 1942, the date the regulation was issued [C.C.H. War Law Service, p. 44, 409-3, note 1]. Thus, in their case at the

time they acted there was available a method for seeking administrative and judicial relief against the regulation if it caused them hardship. They might have filed a protest against the regulation and if the Administrator ultimately ruled against them, they had recourse to the Emergency Court of Appeals and the Supreme Court of the United States.

One other feature of the statute requires comment before the narrow scope of the constitutional question is sharply revealed. Under § 205 (b) of the Emergency Price Control Act of 1942, 56 Stat. 33, U.S.C. Ti. 50 § 925 (b) criminal sanctions are applicable only against a person "who wilfully violates" a regulation, order, or statutory provision. This means that there must be either a conscious violation or deliberate unwillingness to discover and obey the law.

Thus the precise question now presented is whether in the exercise of its war powers Congress can absolutely forbid the violation of a price regulation which, though it may have some hidden infirmity, was valid on its face, was known to the person regulated and at the time he violated it, was susceptible of review at his instance in designated administrative and judicial tribunals.

The question is not so novel as the defendants suppose. It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that the application for a license would have been unavailing. *Lehon v. Alabama*, 242 U.S. 53, 56; *Hall v. Geiger Jones*, 242 U.S. 539, 554, especially lines 22-24; *Bradley v. City of Richmond*, 227 U.S. 477, 485. Cf. *Highland Farms Dairy Inc. v. Agnew*, 300 U.S. 608, 616-617; *Bourjois Inc. v. Chapman*, 301 U.S. 183, 188. In short, the individual is given the choice of securing a license, or staying out of the occupation, or, before he acts, seeking a review in the civil courts of the licensing authority's refusal to issue him a license. Likewise in the case at bar the defendants are given the choice of complying with the

regulation, or not engaging in the regulated activity, or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation.

Indeed, there is an even closer parallel to the case at bar than the licensing cases. Congress can establish a rate-making body, such as the Interstate Commerce Commission, and, under criminal sanctions, require persons to comply with orders of that agency until they are set aside. *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441; *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (C.C.A. 3) *United States v. Vacuum Oil Co.*, 158 Fed. 536 (W.D. N.Y.). If, a defendant charged with criminal violation of a railroad rate order cannot show in his defense that the rate is discriminatory or unreasonable, then it is no departure from accepted principles to preclude a defendant charged with criminal violation of an OPA regulation from showing that the formulation, operation or application of the regulation is arbitrary.

In short, I conclude that as here applied paragraph 204 (d) of the Emergency Price Control Act of 1942 is constitutional. In time of war and as an integral part of a system of preventing inflation, Congress can forbid the deliberate violation of a price regulation which is valid on its face, even though there may be hidden defects in the formulation or operation of the regulation or its application to particular persons. If a person subject to the regulation believes that such hidden defects exist, he must assume the burden of drawing them to the attention of the administrator and, if desired, the Emergency Court of Appeals and the Supreme Court of the United States. Until those tribunals have acted upon his plea, the individual must either act in accordance with the regulation or not act at all. Congress has determined that such inconvenience and delay as are necessarily involved in securing an administrative change in or exemption from a price, rent, rationing or like regulation shall be borne by the person who believes his case exceptional, and that in the meantime the community at

large shall have the benefit of compliance with the regulation.
The motion to quash is denied.

CHARLES E. WYZANSKI, JR.,

United States District Judge.

March 2, 1943.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the record on appeal in the causes entitled respectively

No. 16074, CRIMINAL,

THE UNITED STATES, by Indictment,

v.

BENJAMIN ROTTENBERG, Defendant,

No. 16075. CRIMINAL,

THE UNITED STATES, by Indictment,

v.

B. ROTTENBERG CO., INC., Defendant,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this seventh day of June, A.D. 1943.

[SEAL]

JAMES S. ALLEN, *Clerk.*

[fol. 68] Proceedings in Circuit Court of Appeals

On March 26, 1943, duplicate notices of appeal, statements of docket entries, and motion to consolidate were filed, and an order of consolidation was entered.

Thereafter, to wit, on June 29, 1943, the following stipulation was filed:

STIPULATION

In the above-entitled matter, the Bill of Exceptions does not show the ground upon which the defendants' motions for new trial were denied and such omission was due to accident or error.

It is hereby agreed and stipulated that the motions for a new trial (R. 25-26) were denied upon the ground that Section 204 (d) of the Emergency Price Control Act prevented the Court from considering the alleged invalidity of the Regulation.

(S.) William H. Lewis, John H. Backus, Leonard Poretsky, Counsel for Defendants. (S.) Edmund J. Brandon, U. S. Attorney.

On the same day, to wit, June 29, 1943, this consolidated cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on August 23, 1943, the following Opinion of the Court was filed:

[fol. 69] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3885

BENJAMIN ROTTENBERG, et al., Defendants, Appellants,

v.

UNITED STATES OF AMERICA, Appellee

No. 3892

ALBERT YAKUS, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for
the District of Massachusetts

Before MAGRUDER, MAHONEY and WOODBURY, JJ.

Leonard Poretsky, John H. Backus, William H. Lewis, for
Benjamin Rottenberg, et al.

Leonard Poretsky, Francis P. Garland, Joseph Kruger,
for Albert Yakus.

Robert L. Wright, Special Assistant to the Attorney
General.

Edmund J. Brandon, U. S. Attorney; William T. McCarthy,
Joseph J. Gottlieb, Assistant U. S. Attorneys, for United
States of America.

OPINION OF THE COURT—August 23, 1943

MAGRUDER, J.:

In these criminal prosecutions for violations of § 4(a) [fol. 70] of the Emergency Price Control Act (56 Stat. 28) by making sales at prices in excess of those prescribed by an applicable price regulation, the question is squarely presented whether, or to what extent, the trial court may entertain a defense based upon the alleged invalidity of the regulation. The point was left open in *Lockerty v. Phillips*, — U. S. —, decided May 10, 1943.

No. 3885 embraces two indictments, one against Rottenberg, who was president and treasurer of B. Rottenberg Co., Inc., and one against the corporation. The two indictments were consolidated for trial and are here on a consolidated appeal. Each defendant was convicted on several counts of making sales of wholesale cuts of beef in December, 1942, and January, 1943, at prices higher than the maximum prices as determined under Revised Maximum Price Regulation No. 169,¹ in willful violation of § 4(a) of the Act. Sentence of six months in jail and a fine of \$1,000 was imposed upon the individual defendant. The corporate defendant was fined \$1,000.

No. 3892 embraces a similar indictment against Yakus, who was president of the Brighton Packing Company. He was convicted on three counts of making sales of wholesale beef cuts in December, 1942, and January, 1943, at prices higher than the maximum prices established by the aforesaid regulation and was sentenced to jail for six months and fined \$1,000.

The cases were heard together on appeal in this court. They involve essentially the same questions, and hereafter in this opinion reference will be made only to the proceedings in Rottenberg's case.

¹ 7 F. R. 10,381. The regulation was issued December 10, 1942, to become effective December 16, 1942.

At various appropriate stages in the proceedings Rottenberg [fol. 71] challenged the constitutionality of the Emergency Price Control Act. The District Court upheld the Act.

The Government introduced sufficient evidence to warrant verdicts of guilty on all the counts which were submitted to the jury.

Rottenberg introduced no testimony except an offer of proof of detailed economic data designed to show that Revised Maximum Price Regulation No. 169 was arbitrary and capricious and failed to provide a fair and equitable margin of profit to slaughterers and wholesalers conducting their business in an efficient manner. The court declined to receive the offer of proof on the ground that § 204 of the Act deprived it of jurisdiction to entertain such a defense. Rottenberg duly took exception to this ruling, the correctness of which is the most serious question now before us.

There is first the inquiry whether the Act as a matter of interpretation precludes this sort of defense to the indictments now before us. If so, then we must decide whether it was competent for Congress so to provide "in a statute born of the exigencies of war." *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 17 (1942).

On July 30, 1941, many months before our country was attacked at Pearl Harbor, the President transmitted to Congress a message setting forth the necessity of legislation to control prices. H. Doc. No. 332, 77th Cong., 1st Sess. He submitted figures to show that inflationary price rises were threatening to undermine our defense effort "unless we act decisively and without delay." After extended consideration the House passed on November 28, 1941, a bill to control prices and rents. H. R. 5990, 77th Cong., 1st Sess. This bill contained quite a different scheme for review of price regulations from what was ultimately enacted. In the first instance review was to be had before a Board of Administrative Review; any person aggrieved by the decision of such board might petition for review in the appropriate circuit court of appeals. The bill contained no provision corresponding to that now found in § 204(d) of the Act upon which the court below relied in excluding the offer of proof.

On January 2, 1942, the Senate Committee on Banking and Currency reported out the House bill, with substantial

amendments, including the review provisions which eventually became law, and which we shall examine in detail later.

The Senate committee report (Sen. Rep. No. 931, 77th Cong., 2d Sess.) pointed out that the House bill had been passed before we entered the war and that the bill needed to be strengthened now that we were embarked upon an "unlimited national mobilization in a war for survival." While the country was concerned with the danger of inflation even before December 7, 1941, "the pressures on the price structure, already enormous, will be multiplied" now that we are engaged in a world war. The committee pictured in vivid terms what would be the disastrous consequences of inflation by way of sapping our national strength and effort and morale. "Effective price control, under these circumstances, must no longer be delayed." The report added: "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to proceed at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency."

The Emergency Price Control Act of 1942 became law on January 30, 1942.

Section 1(a) of the Act sets forth its purposes and declares that price and rent control are "necessary to the effective prosecution of the present war."

The temporary, emergency character of the legislation was emphasized by the provision in § 1(b) that the Act [fol. 73] "shall terminate on June 30, 1943", or upon such earlier date as the President by proclamation, or the Congress by concurrent resolution, may prescribe.²

Section 2(a) provides that whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the Act, "he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." In establishing any maximum price, he is directed, so far as practicable, to ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, and to make adjustments for such

² This terminating date has since been extended to June 30, 1944. 56 Stat. 767.

rélevant factors as he may determine to be of general applicability. The Administrator is also directed, so far as practicable, before issuing any price regulation, to consult with representative members of the industry affected. Further to assure that no price regulation would be issued without due consideration by the Administrator of the factors involved, it is required that every price regulation issued by him "shall be accompanied by a statement of the considerations involved in the issuance of such regulation". After a regulation is issued the Administrator is required, if requested by any substantial portion of the industry affected, to appoint an advisory committee truly representative of the industry with whom he shall advise and consult from time to time with respect to the regulation, the form thereof, and classifications, differentiations and adjustments therein. Under § 2(c) any price regulation "may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary and proper in order to effectuate the purposes of this Act."

Section 4(a) provides that it shall be unlawful "for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2, . . .". This subsection is implemented by § 205(b) which provides that any person "who willfully violates any provision of section 4 of this Act" shall, upon conviction thereof, be subject to a fine or imprisonment or both. In § 205(c) it is provided that "the district courts shall have jurisdiction of criminal proceedings for violation of section 4 of this Act."

Sections 203 and 204 provide in detail the procedure for administrative review, and ultimate court review, of price and rent regulations, first in a special court of the United States known as the Emergency Court of Appeals, and then in the Supreme Court, upon certiorari. This special court, created by § 204(c), consists of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. It is given the powers of a district court with respect to the jurisdiction conferred upon it, except that it "shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining in whole or in part, the effectiveness of any regulation or order issued under section 2."

Under § 203(a), within a period of sixty days after the issuance of any regulation under § 2, "any person subject to any provision of such regulation" may "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." Within thirty days after the filing of such protest "the Administrator shall either grant or deny such protest, in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in [fol. 75] connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

If the Administrator denies such protest, in whole or in part, any person aggrieved by such denial may within thirty days thereafter, under § 204(a), file a complaint with the Emergency Court of Appeals, specifying his objections and praying that the regulation protested be enjoined or set aside in whole or in part. Upon receipt of service of such complaint it is the Administrator's duty to certify and file with the court a transcript of such portions of the protest proceedings as are material to the complaint. The transcript shall include a statement setting forth, so far as practicable, "the economic data and other facts of which the Administrator has taken official notice." Upon the filing of such complaint "the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part; to dismiss the complaint, or to remand the proceeding." No objection to such regulation, and no evidence in support of any objection thereto, shall be considered by the court, "unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript." Appropriate provision is made for applications by either party for leave to adduce additional evidence.

Section 204(b) provides that no such regulation shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation "is not in accordance with law, or is arbitrary or capricious." The effectiveness of any such judgment by the Emergency Court "shall be postponed until the expiration of thirty days from the entry thereof", except that if petition for certiorari is filed with the Supreme Court

[fol. 76] within such thirty days, the effectiveness of such judgment "shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."³

The particular provision of the Act upon which the controversy turns in the present cases is found in § 204(d) as follows:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation * * * issued under section 2 * * * and of any provision of any such regulation. * * * Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation * * *, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations * * * or any provision of any such regulation * * * or to restrain or enjoin the enforcement of any such provision."

Section 205 contains several subsections in aid of enforcing the Act. Subsection (a) authorizes the Administrator to make application to any appropriate court for an order enjoining violations of § 4. Subsections (b) and (c) contain the provisions for criminal prosecution already referred to. Subsection (d) refers to litigation between private parties in which some provision of the Act, or a regulation issued thereunder, may be involved. Subsection (e) [fol. 77] provides that a buyer of a commodity who has paid more than the applicable maximum price may, with some limitations, bring suit against the seller for treble damages.

³ With respect to this provision the report of the Senate committee states: "This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204(d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court." Sen. Rep. No. 931, 77th Cong., 2d Sess., p. 24.

in any court of competent jurisdiction. Subsection (f) contains detailed and carefully guarded licensing provisions.

It is the contention of appellants that since the provision of § 204(d), above quoted, is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside, it should be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; in other words, that none of the regular courts shall have jurisdiction to entertain a suit by such person to set aside any provision of the Act or a regulation thereunder or to restrain the enforcement thereof.

This argument overlooks the breadth of the language in § 204(d). The subsection provides, affirmatively, that the Emergency Court of Appeals, and the Supreme Court on certiorari therefrom, "shall have exclusive jurisdiction to determine the validity of any regulation." Then follows the negative statement of the same idea, significantly expressed in three distinct clauses: Except as provided in § 204, (1) "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation"; (2) "or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act or of a regulation thereunder"; (3) "or to restrain or enjoin the enforcement of any such provision." (2) and (3) refer aptly to injunction suits brought by a person subject to a regulation. (1) is much broader and seems clearly enough to say that no other court shall have jurisdiction or power to consider the validity of any regulation, however the litigation may originate. Since this is a blanket provision it is natural that it is placed in a section which prescribes the [fol. 78] only procedure by which the validity of a regulation may be subjected to court review. It thus became unnecessary to write the same limitation into each of the subsections of § 205 dealing with the various methods of enforcement.

Our interpretation of § 204 (d) is confirmed by the legislative history, if confirmation were necessary. The report of the Senate Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong. 2d Sess.) states (p. 7):

"The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in

different circuits on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operation."

And, again, in the same report (pp. 24-25), emphasizing the distinct clauses in the last sentence of § 204(d):

"Section 204(d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

It is thus clear that the limitations of § 204(d) were intended to apply not only to injunction suits brought by a person affected by a regulation, but also to enforcement proceedings, both criminal and civil, brought under § 205. Any court in which criminal or civil enforcement proceedings are brought may determine the constitutional [fel. 79] validity of the Act itself, but in such proceedings consideration of the validity of a regulation is precluded.

Section 4(d) provides: "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." Appellants, therefore, were not required to act, but, in effect, the Congressional command to them was that if they chose to act they must act in accordance with an outstanding price regulation until the same is set aside in proceedings directed to that end in accordance with the provisions of §§ 203 and 204.

It is contended that such a command constitutes a denial of due process of law in violation of the Fifth Amendment. We do not think that this is so.

It is beyond all doubt that Congress in the exercise of its war power may control prices as part of a war-time anti-inflation program. *United States v. Macintosh*, 283 U. S. 605, 622 (1931); *Taylor v. Brown*, United States Emergency Court of Appeals, July 15, 1943. This power is "a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation." *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426 (1934). The validity under the due process clause of the methods selected by Congress for effectuating price control cannot be judged apart from a consideration of the practical necessities of administration. *Jacob Ruppert v. Caffey*, 251 U. S. 264, 299, 301 (1920). "The Constitution as a continuously operating charter of government does not demand the impossible or the impracticable." *Hirabayashi v. United States*, U. S. , June 21, 1943. In *Nebbia v. New York*, 291 U. S. 502, 539 (1934), the court said, "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual [fol. 80] liberty." Since the war-time power of Congress to control prices includes the power to adopt such means to this end as might rationally be considered necessary for the effective administration of the regulatory program, the only question remaining to the courts, under the Fifth Amendment, is whether Congress had any rational basis for its judgment that administrative necessities in a scheme of nation-wide price regulation require that price regulations issued by the Administrator must be generally observed until the regulations are set aside pursuant to the orderly review procedure set forth in the Act. Nothing would seem to be gained by expressing the issue in more esoteric terms to disguise the non-technical nature of the judgment; the courts are called upon to make under the Fifth Amendment.

It is common knowledge that the danger of runaway inflation was acute when Congress passed the Emergency Price Control Act. The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities, affecting a wide range of industries, the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started.

Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. It [fol. 81] was not to be anticipated that he would glory in being "arbitrary or capricious", or that he would be loathe to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable". He is at least as much interested as anybody else in the successful administration of his office.

Furthermore, the Administrator alone has power to recast regulations as circumstances may indicate the need. All that a court could do would be to strike down; it could not draft and put in force a substitute regulation. If a violator could procure an acquittal in a criminal case by convincing the particular district court or jury that the regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal; and for practical purposes enforcement of the regulation in that district would be at an end. In other districts the regulation might be upheld. As the Government well says in its brief: "The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the area in which higher prices prevailed. Producers in low-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities." The same damaging results would follow if the ordinary courts were empowered to set aside a regulation or grant injunctions against its enforcement. If some commodities thus got released from price control, even temporarily, the consequences might well be irretrievable, and,

our economy being all of a piece, pressures would develop on other commodities to break through their ceilings. Hence, even the Emergency Court of Appeals (which alone has been given power to set aside a regulation on grounds [fol. 82] not involving the constitutional validity of the Act itself) is not empowered to grant a stay pending the litigation.⁴

If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation.

In view of these considerations, it is easy to see why Congress chose the particular review procedure set forth in §§ 203 and 204. If a person subject to a regulation believes that it is not generally fair and equitable or causes avoidable hardships or dislocations, he must first make his protest to the Administrator, who is thus given the opportunity to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. The Administrator and his staff, the collective entity known as the Office of Price Administration, develop day by day an expertness in the whole field of price regulation certainly beyond that of the courts, which makes it reasonable that a protest should first be reviewed by this agency. Furthermore, as already pointed out, the Administrator is the only one with power to make adjustments or amendments. The Administrator may be convinced by the protest, and take appropriate action. If so, well and good. If not, further review is available in the Emergency Court and finally in the Supreme Court, on the basis of a proper administrative record and with the benefit of a considered written opinion by the Administrator explaining why he deemed the protest not to be well taken. We have already quoted from the Senate [fol. 83] committee report the reason why judicial review is channeled through this special court:

No doubt, the judicial review thus provided takes some time before a final adjudication can be reached. But it was not to be supposed that meritorious protests would, in the

⁴ See footnote 3, *supra*.

great majority of cases, have to be pressed to the stage of judicial review. As it has worked out, considering the great number of commodities that have had to be regulated and the millions of people who have been subjected to the regulations, there have been surprisingly few complaints filed in the Emergency Court.⁵ So far as individuals may suffer hardship and inconvenience because of the delay involved in the review procedure, this they must bear in the interest of the greater public good resulting from general compliance with the regulations until they are set aside or amended in an orderly way.

The District Court pointed out that in the present cases the regulation was not invalid on its face, but that the question whether it was arbitrary or capricious or failed to conform to the statutory standards depended upon a consideration of extrinsic economic data. In view of the broad separability clause in § 303 of the Act, the court quite properly confined its ruling under the Fifth Amendment to the facts of the cases before it. We shall observe the same caution. There might be a difference if the regulation as a pure matter of law were invalid on its face; if, for example, it covered a commodity which, under a proper construction of § 302(c), was exempted by Congress from price regulation. Cf. *Davies Warehouse Co. v. Brown*, United States Emergency Court of Appeals, May 28, 1943. We intimate no opinion on this.

We conclude that § 204(d), as applied to these appellants, is not bad under the Fifth Amendment.

[fol. 84] The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem. See *Johnson v. United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *American Bond & Mortgage Co. v. United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *Bradley v. City of Richmond*, 227 U. S. 477, 485 (1913); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440-41 (1907); *United States v. Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y., 1908); *Lehigh Valley R. R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3d, 1911). Cf. *White v. Johnson*, 282 U. S. 367, 373 (1931). It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are

⁵ To date 79 complaints have been filed.

satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us.

It is not amiss to note that in *Hirabayashi v. United States*, U. S. , June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhorrent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress.

As a further argument against § 204(d) appellants contend that when Congress in § 205(c) vested in the district courts jurisdiction of criminal proceedings, the judicial power which such courts are thus called upon to exercise is derived from Article III of the Constitution and not from Congress; that the question of the relevancy of evidence offered in a criminal trial raises a question of law which must necessarily be decided by the court in the exercise of its judicial power; and that it is unconstitutional for Congress to take from a court having jurisdiction to try a criminal indictment its judicial power to decide a question of relevancy.

But the answer is, that Congress has not taken from the district courts the judicial power to decide any question of relevancy of proffered evidence. The District Court exercised such power in these very cases. It ruled that the Emergency Price Control Act was a valid enactment, and that under the provisions of the Act the proffered evidence was not relevant. Appellants were indicted, not for a violation of the Administrator's price regulation, but for a violation of § 4(a) of the Act. Congress has said that it shall be a crime willfully to sell a commodity for a price in excess of that established by an outstanding price regulation, as long as such regulation has not been set aside by the statutory procedure. This is clearly the meaning and effect of the Act, though in § 204(d) Congress has expressed it in terms of denying "jurisdiction or power" to the courts to consider the validity of the regulation. Hence it was entirely immaterial to the criminal liability of these appellants whether Revised Maximum Price Regulation No. 169 might have been set aside had appellants chosen to avail

themselves of the procedure set forth in §§ 203 and 204 of the Act.

Nor have appellants been denied the right of a jury trial as guaranteed by the Sixth Amendment. They have had a jury trial on all the issues relevant under the statute.

Finally, the Act is challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator. This point is not well taken. *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940); *Mulford v. Smith*, 307 U. S. 38 (1939); *Hirabayashi v. United States*, — U. S. —, decided June 21, 1943. The Emergency Price Control Act was upheld as against the challenge of [fol. 86] unconstitutional delegation in *Taylor v. Brown*, decided by the United States Emergency Court of Appeals, July 15, 1943. There is no need to repeat or elaborate what was said there.

The judgments of the District Court are affirmed.

On the same day, to wit, August 23, 1943, the following Judgment was entered:

JUDGMENT—August 23, 1943

This consolidated cause came on to be heard June 29, 1943, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgments of the District Court are affirmed.

By the Court, Arthur I. Charron, Clerk.

Thereafter, to wit, on August 24, 1943, appellants filed a motion for stay of mandate which was allowed on August 30, 1943; and on August 27, 1943, appellee filed a motion to vacate stay of sentence which was denied on August 30, 1943.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is consolidated with No. 374 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9527)

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SEP 22 1943

CHARLES CLARKE HOPLEY
CLERK

Supreme Court of the United States

October Term, 1942.

No. 375

**BENJAMIN ROTTENBERG and B. ROTTENBERG,
INC., *Petitioners,***

v.

UNITED STATES OF AMERICA, *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT AND BRIEF IN SUP-
PORT OF THE PETITION.**

✓ **LEONARD PORETSKY,**

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✓ **WILLIAM H. LEWIS,**

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Counsel for Petitioners.

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Supreme Court of the United States

October Term, 1943.

No. _____

BENJAMIN ROTTENBERG and B. ROTTENBERG,
INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF AP- PEALS FOR THE FIRST CIRCUIT.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioners, Benjamin Rottenberg and B. Rotten-
berg, Inc., respectfully represent the following:

I. Summary Statement of Matter Involved.

The petitioners were convicted by a jury after trial in the United States District Court for the District of Massachusetts upon indictments numbered 16074 and 16075 (R. 1-13) charging them in twenty counts with the sale and delivery of wholesale beef cuts at prices higher than the maximum prices established under Revised Maximum Price Regulation No. 169, as amended, allegedly issued and effective pursuant to the provisions of the Emergency Price

Control Act of 1942 (P. L. No. 421, 77th Cong.) 56 Stat. 23, as amended by the Inflation Control Act of 1942 (P. L. No. 729, 77th Cong.), 56 Stat. 765.

The petitioner, Benjamin Rottenberg, was sentenced on March 10, 1943 to pay a fine of \$1,000.00 and to serve a term of six months in jail (R. 26-27). The petitioner, B. Rottenberg, Inc., was sentenced on the same date to pay a fine of \$1,000.00 (R. 54-55).

The petitioners filed an appeal to the United States Circuit Court of Appeals for the First Circuit upon various grounds presented in the Motion to Quash (R. 14-19) and Amendment to Motion to Quash (R. 19-20); upon the Court's refusal to Direct a Verdict of Not Guilty on Count 1 for Variance, in each indictment, and upon the Court's refusal to give certain Requests for Rulings and Instructions (R. 38-41); upon the Court's overruling the Motion for a New Trial as appears in the motion (R. 25-26) and the Court's denial of a Motion in Arrest of Judgment upon the grounds stated therein (R. 23-24).

The Circuit Court of Appeals for the First Circuit on August 23, 1943, handed down an opinion affirming the judgments and sentences of the District Court (R. 69) and entered judgment (R. 86).

The Circuit Court of Appeals in its opinion did not consider certain questions raised by the petitioners in their briefs and pleadings and ignored them, but decided upon the following main grounds: 1st. That the Act challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator, was a point not well taken (R. 85); 2nd. That Section 204 (d) of the Act (56 Stat. 26) deprived the United States District Court in criminal proceedings from considering the validity of Revised Maximum Price Regulation No. 169,¹ as amended, (R.

¹ 7 F. R. 10,381.

83), stated in another way, the Circuit Court of Appeals held in substance with the District Court that the validity of a Regulation could not be questioned in any court except the Emergency Court of Appeals and that the District Court trying a criminal indictment was precluded from receiving any evidence as to the invalidity of the Regulation upon which the indictment was based (R. 79) and that persons failing to file a protest with the Administrator under Section 203 and follow the procedure for review outlined in Section 204 of the Act, were precluded from challenging the validity of the Regulation when brought into Court as defendants upon a criminal indictment in Massachusetts; 3rd. Although the question was raised in the pleadings and brief that the Regulation upon which the case was tried was a joint regulation under the Emergency Price Control Act and Executive Order No. 9250,² no consideration was given to the question of whether the Regulation was issued under Section 2 of the Act, which, under the Act itself, is the only case where the "exclusive jurisdiction" of the Emergency Court under Section 204 (d) applies; 4th. The District Court refused to consider evidence submitted upon the Motion for a New Trial (R. 25-26) and Motion in Arrest of Judgment (R. 23-24) to the effect that Price Administrator Prentiss M. Brown had declared that the law had not been followed in issuing the Regulation, and that the middlemen were entitled to a reasonable margin of profit and that he intended to see that these men had a reasonable margin of profit such as they had before these terrible restrictions,³ said refusal being predicated upon the sole ground that Section 204 (d) of the Act precluded the Court

¹ 7 F. R. 7871.

² Hearing of the Sub-Committee of the Committee on Agriculture & Forestry held at Washington, D. C., on March 3, 1943.

from considering the validity of the Regulation (R. 68), and this question was not passed upon by the Circuit Court of Appeals.

II. Grounds Upon Which Jurisdiction of this Court is Invoked.

A. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347 sub-division (a) (Judicial Code, Section 240a as amended) and Rule 38 of Revised Rules, 1939, of the Supreme Court of the United States.

B. The Circuit Court affirmed a conviction of sentence and imprisonment in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Fifth Amendment to the Constitution of the United States.

C. The Circuit Court affirmed a conviction of sentence and imprisonment in violation of the guarantees of the Sixth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Sixth Amendment to the Constitution of the United States.

III. Questions Presented for Review.

1. Whether the Emergency Price Control Act is unconstitutional by reason of unlawful delegation of legislative power and the indefinite standards of the enumerated subjects in Section 1 of the Act, such delegation being contrary to Article 1, Section 1 of the Constitution of the United States.

2. Whether the trial judge and the Circuit Court of Appeals were right in their rulings that upon a trial of a

criminal indictment against these defendants they were precluded from questioning the validity of the Regulation upon which the indictment was based; and stated another way, the question presented for review is whether the Emergency Court of Appeals has exclusive jurisdiction to determine the validity of any Regulation made by the Administrator, and stated in a third way, the question presented is whether the procedure set up by Sections 203 and 204, if not complied with by the defendants, preclude them from challenging the validity of the Regulation upon the trial of an indictment against them.

3. Whether the defendants are entitled to have questions of law raised by them in their trial upon a criminal indictment passed upon by the Circuit Court of Appeals or passed over by the Court.

4. Where the Emergency Price Control Act of 1942 in Section 205 (c) has given jurisdiction of criminal proceedings to the District Court, can the power of that Court be limited or restricted by the provisions of Section 204 (d) so as to deprive a citizen from presenting any legal defense.

5. Whether the defendants have been deprived of their rights under the Fifth Amendment to the Constitution by taking of their liberty and property without due process of law.

6. Whether the defendants have been deprived of their rights under the Sixth Amendment to the Constitution to be tried in the State and District wherein the crime shall have been committed with the power to raise all defenses which they might make in any criminal case.

IV. Reasons Relied on for the Allowance of the Writ.

1. This case involves the important question of whether the standards set out by the Emergency Price Control Act

of 1942 and delegation of authority to the Price Administrator is such as to render the Act unconstitutional as an unlawful delegation of legislative power. The Circuit Court of Appeals held that the Act was constitutional. Petitioners believe that the language setting forth the purposes of the Act are vague, uncertain and indefinite, that the delegation of authority to the Price Administrator violates Article 1, Section 1 of the Constitution of the United States, and should be decided by this Court as it is a matter with which all of our citizens are affected in their daily life.

2. This case also involves the important question of whether an administrative officer may issue a regulation having the force of law and a defendant in a criminal indictment be precluded from showing that the Regulation was not issued in accordance with law. The question as to what extent the trial court may entertain a defense based upon the alleged invalidity of this Regulation was left open in *Lockerty v. Phillips*, U. S., decided May 10, 1943, where this Court said:

"We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in Courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or Regulations issued under it."

3. Was the Regulation *issued* under Section 2 of the Act? Although the exclusive jurisdiction of the Emergency Court referred to in Section 204 (d) is limited to regulations *issued* under Section 2; no determination was made by the Circuit Court of Appeals of this question.

Under the Regulation here involved the Price Administrator has not fixed the prices in the manner contemplated by the Act and within the rules of the delegated power. He delegates to the defendants the power and authority to fix the ceiling prices under conditions which are most difficult and appalling. The opinion of the Court relates the difficulties under which the Government or Price Administrator labors in fixing maximum prices and that he should be given a chance by trial and error to arrive at a fair ceiling price. The opinion of the Court does not take into consideration the difficulties of the middleman in the beef business and does not consider that the non-action of the Administrator in placing a maximum price upon the grower or producer of cattle puts the middleman in a position where he becomes a victim of blackmail when a consumer ceiling price is fixed and that the Act affords no remedy against the Administrator for non-action. The Regulation itself, recites that it is intended to be issued under the joint authority of Emergency Price Control Act, the Inflation Control Act and Executive Order #9250.

4.- This case further involves the very serious question of whether the language of Section 204 (d) of the Act intends to deprive the District Court of some of the power conferred upon it under Section 205 (c) wherein the District Court is given *jurisdiction* of criminal proceedings for violations of Section 4 of the Act.

The *jurisdiction* of the District Court, which was established by Congress under Article III, Section 1, of the Constitution, is vested by congressional enactment. Congress has determined that the District Court within the District of Massachusetts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States." Title 28, U. S. C. Section 41 (2). Title 18, U. S. C. Section 546, provides: "The crimes and of-

fenses defined in this title shall be cognizable in district courts of the United States". Section 205 (c) of the Emergency Price Control Act of 1942, as amended, provides that "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act".

5. The decision of the Circuit Court of Appeals presents a substantial question of federal law as to whether the defendant's constitutional rights under the due process clause of the Fifth Amendment to the Constitution has been violated. The Circuit Court in affirming the judgment of conviction and sentence has said that the exclusive jurisdiction of the Emergency Court under review procedure of 204 of the Act precludes the District Court from determining the validity of any Regulation in a criminal action. The doctrine of exhaustion of administrative remedies was never intended to apply to criminal prosecutions and no consideration is given by the courts below to the inadequacy of the relief afforded by the Act. What is intended to be a form of relief really means compliance with a Regulation, no matter what hardships result therefrom, or going out of business. The Act affords no means of aiding one from the harshness of a Regulation as no court has the power to stay the effectiveness of a Regulation once it is issued under Section 2. The only thing a person subject to a regulation can do is to follow the protest procedure under Section 203 and the review procedure under Section 204 of the Act. This procedure may cover a total of 150 days and does not include possible postponements or time taken for consideration. With constantly changing economic conditions, uncontrolled prices on live stock and the power resting in the Administrator to modify or rescind the Regulation at any time, notwithstanding the pendency of review, the relief set out by the Act is indeed illusory.

6. While the Sixth Amendment to the Constitution by direction guarantees the accused in criminal prosecutions trial by an impartial jury of the state and district wherein the crime shall have been committed * * * and to be confronted with the witnesses against him, Sections 203 and 204 of this Act, by indirection, have the effect of depriving the defendants in a criminal prosecution of those guarantees.

Section 203 permits the administrator to take notice of economic data and other facts and he may limit a protest to the filing of affidavits. The Emergency Court, being restricted to *review* the action of the Administrator, no person is entitled to go into any court, cross-examine the witnesses and present such evidence as ordinarily leads to a judicial determination of facts.

7. There are at least six cases pending in the United States District Court of Massachusetts where judgment is awaiting the decision in the case at bar. The petitioners are informed and believe that there are 75 to 100 cases in the same situation involving the same Regulation and the questions raised in this petition are of grave and serious public importance, and involve important questions of federal law upon which enforcement depends, which have not been, but should be, settled by this Court.

Wherefore, your petitioners pray that Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit directing said Court to certify and send to this Court a full and complete transcript of the Record and the Proceedings of the said Circuit Court had in the case numbered and entitled on its Docket calendar #3885, *Benjamin Rottenberg, et als, Defendants-Appellant v. United States of America, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided further by the statutes of the United

States; and that judgment of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated September 10, 1943.

BENJAMIN ROTTENBERG and
B. ROTTENBERG CO. INC.,
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Petitioners.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

I. Opinions of the Court Below.

The memorandum of the District Court upon Motion to Quash is in the record (R. 59-67). The opinion of the Circuit Court of Appeals rendered August 23rd, 1943 is unreported and is (R. 69-86).

**II. Grounds Upon Which Jurisdiction of this Court
is Invoked.**

A. The reasons stated in the preceding petition under II (p. 4) herewith adopted and made a part of this brief are believed to constitute good ground for invoking the jurisdiction of this Court.

B. The reasons stated in the preceding petition under III (pp. 4-5) herewith adopted and made a part of this brief

are believed to constitute good ground for invoking the jurisdiction of this Court.

III. Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

IV. Specifications of Errors.

The Circuit Court of Appeals erred:

- a. In denying the defendants' motion to quash the indictment (R. 14).
- b. In denying the defendants' amended motion to quash the indictment (R. 19).
- c. In denying the defendants' requests for rulings (R. 38-41).
- d. In denying the defendants' motion in arrest of judgment (R. 23).
- e. In denying the defendants' motion for a new trial upon newly discovered evidence (R. 25).
- f. In holding that the Emergency Price Control Act of 1942 was constitutional.
- g. In refusing to consider the offer of proof of the defendants on the ground that the District Court in trying a criminal case was precluded from hearing evidence and passing upon the invalidity of the Regulation.
- h. In disregarding the questions raised by the defendants as to whether the Regulation was issued under Section 2 of the Act.
- i. In ruling that although the district court was given jurisdiction of criminal proceedings, it lacked the

- power to pass upon the validity of the Regulation upon which the indictment was based.
- j. In holding that the Act as applied did not violate the due process clause of the Fifth Amendment of the Constitution and failing to consider the inadequateness of the procedure outlined in the Act.
 - k. In ruling that the Act as applied did not deny the defendants of the guarantees of the Sixth Amendment to the Constitution of the United States.

V. Summary of Argument.

The Emergency Price Control Act is unconstitutional and in violation of Article 1, Section 1 of the Constitution and the powers given the Administrator are vague, uncertain and indefinite. Where the District Court was given jurisdiction of criminal prosecutions, this included the right to determine all of the law and facts upon which the indictment was founded. The interpretation of the Courts below that the district court had no power to consider the validity of a Regulation and the denial of the right of the defendants to show that the Regulation was not within the power and authority conferred upon the Administrator was in error.

If the Court's construction of the statute is correct then the statute does not afford due process of law and violates the Fifth and Sixth Amendments to the Constitution of the United States.

VI. Arguments, Points and Authorities.

- I. The District Court and Circuit Court of Appeals held that the Emergency Price Control Act, as amended, setting up the Office of Price Administration, did not violate Sec-

tion 1 of Article 1 of the Constitution. The Court argued that the necessity of the war situation and the control of inflation made necessary the establishment of some means even though it be imperfect, in other words, justified the Act. It is submitted that necessity is not sufficient legal grounds upon which to base the Act. Necessity knows no law and generally makes bad law. The means adopted to carry out the purposes of the Act must be within the limitations of constitutional authority. While martial law has not been invoked and the Courts continue to function, the constitutional rights of the individual must be respected. Mr. Justice Murphy, in his concurring opinion in *Hirabayashi vs. U. S.* U. S. decided June 21, 1943, has well said:

"While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men."

The purposes of the Act contained in Section 1a and the delegation of authority as it is contained in Section 2a are found in Appendix A.

It will appear that the Price Administrator is not required to find facts to which the penal provisions of the Act shall be held to apply. He is given unlimited authority to make a regulation as to prices when, in his judgment, the price or prices of a commodity or commodities have risen or threaten to rise in an extent or in a manner inconsistent with the purposes of this Act, he may by regula-

tion or order establish such price or prices as in his judgment will effectuate and regulate the purposes of this Act.

This Court has said quite appropos, in the *Hirabayashi* case, *supra*:

"The constitution as a continuously operating charter of Government does not demand the impossible or the impracticable".

Neither should the Government demand the impossible or impracticable of the citizen.

The whole history of the Office of Price Administration established under the Emergency Price Control Act shows instability and ever-changing policy and confusion. The opinion of the Court of Appeals (p. 80) contains a strong admission of the difficulties under which the Administrator labored.

"Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate inter-relations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations... It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has led on the home front".

That argument is answered by this Court in

Panama Refining Co. v. Ryan, 293 U. S. 388

where the Court said at page 420:

"The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it should be assumed that the President has acted and will act for what he believes to be the public good. The point is not one of motives but of constitutional authority for which the beliefs or motives is not substituted."

These considerations of the Court of Appeals are at once an admission and an apology. It is submitted that this delegation of power to make rules and orders, the violation of which should be a criminal offense, goes far beyond that of any other decided case. Under the unlimited discretion, in the case of

Schechter vs. U. S., 295 U. S. at pp. 537-538
this Court said:

"If the codes have standing as penal standards, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation or expansion of trade or industry." . . .

There, the President was authorized to make a code, "which will tend to effectuate the policy of this title."

The Court said further:

"While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. . . ."

and at pp. 541 and 542:

"In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes and thus enacting laws for the Government of trade and industry through the country is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power".

An examination and analysis of the language of this Act will show that it is much broader than the delegation of power under the National Recovery Act. Here the Price Administrator must judge the future as well as the present and the effect of prices upon the progress of the war, inflation and the feeding of our own civilian population, the military establishments, the army and navy, and the necessities of our allies under the lend-lease Act without any fixed standard or limitations by which he is to be guided or any real limitation placed upon his authority by Congress.

II. The District Court and the Circuit Court of Appeals held that Section 204d of the Act precluded the Court from considering the alleged invalidity of the Regulation because Section (d) provided that the Emergency Court and the Supreme Court should have exclusive jurisdiction to determine the validity of the Regulations or orders issued under Section 2, even in a criminal prosecution.

Upon this construction of the Court, the defendants were denied the right to show that the Regulation was invalid which they were charged with violating, and was not within the authority of the officer making it.

In *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), Mr. Chief Justice Hughes stated at page 432:

"If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission."

In *Bowles v. United States*, — U.S. — (May 3, 1943), Mr. Justice Jackson stated in his dissenting opinion (Mr. Justice Reed concurring):

"The ultimate question raised by Bowles is whether one indicted for failing to submit to an induction order [of a Selective Service draft board] may defend by showing that the order is invalid. . . . The Court does not consider whether one may be convicted for disobeying an invalid order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the Court precludes its determination of the question. *But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made.*" (Italics supplied.)

III. Neither Court made a determination of whether the Regulation in question was issued under Section 2.

A reading of the Regulation itself discloses that it was issued by the authority vested in the Administrator under the Emergency Price Control Act of 1942, the Inflation Control Act of 1942 and Executive Order #9250.

In this connection a portion of the Executive Order which is set out in Appendix C assumes to direct the Administrator to control profits. The Inflation Control Act under which authority the Executive Order was presum-

ably issued does not give the President specific authority to control profits.

Assume that Section 204 (d), does give exclusive jurisdiction to the Emergency Court of Appeals to determine the validity of any Regulation or Order issued under Section 2, must the Courts below give no consideration whatever to a determination of whether, as a matter of law, the Regulation was issued "under Section 2"?

The Statement of Considerations (OPA Document No. 8175), which Section 2 requires should accompany every Regulation, does not appear to have been printed in the Federal Register and is handed to the Court as a separate appendix. It discloses that the Administrator has not made findings of fact and shown his determinations as required by law.

Panama Refining Co. v. Ryan, 293 U. S. 388, 432-433.

This question was not passed upon by the Circuit Court of Appeals.

IV. The constitutionality of an Act under which a person is indicated is always open to question and Congress cannot by legislation take that right away from him.

In addition Section 205 (c) provides:

"The District Courts shall have jurisdiction of criminal proceedings for violation of Section 4 of this Act and concurrently with the State and territorial courts of all other proceedings under Section 205 of this Act."

The Judiciary Act of 1789 R. S. 563 provides that the District Court shall have jurisdiction over all crimes and

offenses cognizable under the authority of the United States. Title 28, U. S. C. Sec. 41 (2).

In *Binderup v. Pathe Exchange*, 263 U. S. 291, the Court said at page 305:

“Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as fact.”

The reason given by the Court of Appeals for its interpretation of Section 304 (d) (R. 81) is as follows:

“If a violator could procure acquittal in a criminal case by convincing the particular District Court or Jury that the Regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal and for practicable purposes the enforcement of the Regulation in that District would be at an end.”

No comment is necessary upon that line of reasoning. Convenience of the Administrator or the enforcement officer cannot determine the constitutionality of the Act or the validity of the Regulation.

The opinion of the Court of Appeals (R. 17) lays down this astounding proposition:

“Appellants were indicted not for a violation of the Administrator's price regulation but for violation of Section 4 (a) of the Act. Section 4 forbids any person from selling or delivering any commodity in the course of his trade or business in violation of any regulation or order under Section 2”.

The Regulation in question was purportedly issued under Section 2. The penal clause of the Act is contained in Section 204 (b) which provides

"Any person who wilfully violates any provision of Section 4 of this Act . . . shall upon conviction be subject to a fine of not more than 2 years; in case of violation of Section 4 (c) and for not more than 1 year in all other cases or to both such fine and imprisonment."

The Act itself is innocuous, harmless and ineffective without the Regulation. It is clear that Congress has delegated to the Price Administrator the power to make the Regulation fixing ceiling prices for wholesalers and it is further said that a violation of that Regulation is a crime and is punishable. The crime is the violation of the Regulation issued under and in accordance with the provisions of the Act.

U. S. v. Grimaud, 220 U. S. 505.

Brodvine v. Revere, 182 Mass. 599.

V. The District Court held that it was precluded from determining the validity of the Regulation or receiving any evidence in support of its invalidity. The Circuit Court of Appeals, in its opinion (R. 78-79), upheld this interpretation of the Act.

The proffered testimony during the course of the trial (R. 32-37) and in support of the motion for a new trial (R. 25-26) was denied upon the sole ground that the Court was precluded from considering the validity of the Regulation (R. 37, 68).

The defendants submit that Section 204 (d) as construed by both courts must be unconstitutional as denying them due process of law under the Fifth Amendment to the Con-

stitution and the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed as guaranteed by the Sixth Amendment.

They have, at various appropriate stages of the case, endeavored to present their defense and have this question decided.

The denial of the motion for a new trial was not based upon the Judge's discretion. The importance of this proffered evidence is further emphasized by testimony of the Administrator before another Congressional Committee.⁴ The opinion of the Circuit Court does not cover this point raised by the defendants.

In *Panamá v. Ryan*, *supra*, at page 433, this Court repeated what was said in *Mahler v. Eby*, 264 U. S. 32, 44;

" . . . 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.' We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."

Defendants have been denied the right to show the invalidity of the Regulation ever since the return of the indictment against them.

⁴ Hearing before the Select Committee to conduct, study and investigate the National Defense Program in its relation to Small Business in the United States Houses of Representatives, 78th Congress First Session on H. res. 18, April 8 and 9, 1943, part 5 (unrevised).

The procedure outlined by Sections 203 and 204 is intended as an administrative remedy, which had to be resorted to by one before he might look to the Courts for affirmative relief. The doctrine of exhaustion of administrative remedies was a procedural step in equity which had to be followed before judicial processes for affirmative relief could be sought.⁵ It has no application to a criminal prosecution.

The indictment was returned on February 24, 1943, more than 60 days after the effective date of the Regulation. The provisions of Section 204 are only applicable after the protest procedure of Section 203 has been followed. No protest can be made after the passage of 60 days, so that no Court, including the Emergency Court, can determine the validity of the Regulation.

The protest and review procedure taking as many as 150 days without accounting for delays or continuances. It affords no relief during the pendency of an appeal or after the appeal has been successfully prosecuted for losses during the period and concludes with the right in the Price Administrator to modify or rescind the Regulation at any time, without notice or a hearing notwithstanding the pendency of review proceeding. This makes the Regulation unworkable, impracticable and impossible to such an extent that it violates the Fifth Amendment in that it deprives the defendant of due process of law.

In connection with the above consideration as to the provisions made by the Act for protest and review and the contended penalties for not following the procedure, attention of the Court is called to the case of

⁵ Raoul Berger, "Exhaustion of Administrative Remedies,"

48 L. Jour. 981, 985-986, (1939)

"Primary Jurisdiction—effect of Administrative Remedies on the Jurisdiction of Courts" 51 Harv. L. Rev. 1251, 1261 (1938).

Washington Terminal Co. v. Boswell, 124 Federal
2nd 235 at 276.

Certiorari granted 315 U. S. 795 and principle laid down by Mr. Justice Stephens which is supported by a long line of decisions.

Ex Parte Young, 209 U. S. 123, 146, 147 and 148.

Cotting v. Goddard, 83 U. S. 79. 101.

Wadley Southern Railway Co. v. Georgia, 235 U.
S. 651, 661, 662.

Oklahoma Operating Co. v. Love, 252 U. S. 331,
336, 338.

In *Washington Terminal Company v. Boswell*, Mr. Justice Stephens in his dissenting opinion said at page 276,

"It is elementary constitutional law that when the legislature provides a remedy but interposes such conditions precedent to its availability that the hazards and burdens incident to its points can reasonably be expected to deter resort to it, the Courts will provide relief in an appropriate proceeding even though the statutory remedy is plainly intended to be exclusive."

VI. Finally the petitioner earnestly requests the Court to review the decision and finding of the Circuit Court of Appeals upholding the constitutionality of the Emergency Price Control Act as applied to this indictment also to determine and settle the question expressly left open by this Court in *Phillips v. Lockerty*, *supra*, as to whether or to what extent an appellant may challenge the Regulation in courts other than the Emergency Court by way of a defense to a criminal prosecution.

Conclusion.

It is respectfully submitted that the questions raised in this case are of wide public interest and importance and so far as is known have not been determined by this Court and is a case in which Certiorari may be granted.

Respectfully submitted,

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APPENDIX A.

EMERGENCY PRICE CONTROL ACT OF 1942 56 STAT. 26.

[PUBLIC LAW 421—77TH CONGRESS]

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes.

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because

of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in cost of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the

foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, which ever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other

facts, including facts found by him as a result of action taken under section 202.-

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on re-

quest by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2.

(d) . . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State,

or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205 (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred.

APPENDIX B.

INFLATION CONTROL ACT OF 1942, 56, STAT. 705. [PUBLIC LAW 729—77TH CONGRESS]

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other

agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes; or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

APPENDIX C.

EXECUTIVE ORDER 9250

TITLE V—PROFITS AND SUBSIDIES

1. The Price Administrator in fixing, reducing, or increasing prices, shall determine price ceilings in such a manner that profits are prevented which in his judgment are unreasonable or exorbitant.

APPENDIX D.

REVISED MAXIMUM PRICE REGULATION 169

SUBPART B—PROVISIONS AFFECTING BEEF

§ 1364.451. *Maximum prices for beef carcasses and wholesale cuts.* Subject to the pricing instructions contained in paragraph (a), the maximum price of each grade of each beef carcass or wholesale cut shall be the maximum price determined as provided in paragraph (b).

(a) *Pricing instructions.* (1) Whenever used in this Revised Maximum Price Regulation No. 169, the term "lower price zone" means a price zone having a lower zone price, and the term "higher price zone" means a price zone having a higher zone price; the words "lower" and "higher" used in the respective terms shall not be construed to refer to the numerical designation of any zone.

(2) Except for the additions permitted in Schedule III hereof, incorporated herein as § 1364.454, the zone price shall be the delivered price anywhere within the zone to which such price applies. Schedule I (paragraphs (a) to (j), inclusive) hereof, incorporated herein as § 1364.452, contains a statement describing the geographical limits of each price zone and the zone prices established therefor.

(3) The applicable zone price shall be the price specified in Schedule I (§ 1364.452) for the zone in which is located the seller's distribution point:

- (i) At which the buyer takes actual physical possession of the meat; or
- (ii) From which local delivery to the buyer's place of business begins; or

(iii) From which the meat, consigned to the buyer, (a) is delivered to a common carrier, other than a railroad, for shipment to the buyer who pays the shipping charges directly to the carrier, or (b) is delivered to a railroad for shipment at the carload rate to the buyer who pays the shipping charges directly to the carrier.

(iv) In the case of a less than carload rail shipment, other than an express shipment to a purveyor of meals, the applicable zone price shall be the price for the zone in which is located the rail unloading station nearest to the buyer's place of business.

(v) On sales to purveyors of meals the distribution point may be, in addition to those listed, the point at which meat consigned to the buyer is delivered to a railway express company for shipment by express to the buyer who pays the shipping charges directly to the carrier.

(4) Except as permitted in paragraphs (l), (m), (n), or (o) of Schedule I (§ 1364.452), regardless of any contract, agreement or other obligation, no person shall sell or deliver any beef or any part or portion of any beef carcass and no person in the course of trade or business shall buy or receive any beef or any part or portion of any beef carcass unless such beef or part or portion is a beef carcass or a beef wholesale cut as defined in § 1364.455, for which applicable prices have been established.

(b) *Maximum price.* The maximum price for each grade of each beef carcass or beef wholesale cut shall be the applicable zone price determined in accordance with the provisions of paragraph (a) of this § 1364.451 and specified in Schedule I (incorporated herein as § 1364.452), minus the required deductions, if any, specified in Schedule II (incorporated herein as § 1364.453), plus the permitted additions, if any, specified in Schedule III (incorporated herein as § 1364.454).

§ 1364.452 *Schedule I: Beef price zones and applicable zone prices—*

(2) *Beef carcass and beef-wholesale cut prices applicable in Zone 4.* Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:

[All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly.]

	Grade					
	Choice or AA	Good or A	Commer- cial or B	Utility or C	Cutter canner or D	Bologna bulls (Equiv- alent cutter and canner grade)
Steer or Heifer						
(i) Beef carcass or side	\$22.00	\$21.00	\$19.00	\$17.00	\$14.50	\$16.00
(ii) Hindquarter	25.25	23.75	21.25	18.75	14.50	16.00
(iii) Forequarter	19.00	18.50	17.00	15.50	14.50	16.00
(iv) Round	24.25	22.75	20.25	17.50		
(v) Trimmed full loin	34.75	32.50	29.00	25.50		
(vi) Flank	11.00	11.00	11.00	11.00		
(vii) Flank steak	25.00	25.00	25.00	25.00		
(viii) Short loin	41.50	38.75	35.00	30.50		
(ix) Sirloin	29.25	27.50	24.25	21.50		
(x) Cross cut chuck	18.75	18.375	17.00	15.375		
(xi) Regular chuck	20.75	20.25	18.75	16.75		
(xii) Brisket	16.00	16.00	14.00	13.00		
(xiii) Foreshank	10.00	10.00	10.00	10.00		
(xiv) Rib (Kosher or trafer)	27.75	26.25	24.00	21.50		
(xv) Short plate	11.50	11.50	10.50	10.50		
(xvi) Back	22.625	21.875	20.25	18.00		
(xvii) Triangle	17.375	17.125	15.75	14.50		
(xviii) Arm chuck	19.25	18.875	17.50	15.75		

The applicable Zone 4 price of each cow carcass or wholesale cut of cutter and canner grade or utility grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade; the applicable Zone 4 price of each cow carcass or wholesale cut of commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of commercial grade.

The applicable Zone 4 price of each stag carcass or wholesale cut of cutter and canner grade, utility grade, commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade.

The applicable Zone 4 price of each bull carcass or wholesale cut of utility grade or commercial grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade. The applicable Zone 4 price of each bologna bull carcass and wholesale cut, which are equivalent to cutter and canner grade are specified above.

The applicable zone price of each beef carcass or beef wholesale cut which does not bear a grade stamp (required by paragraph (c) of § 1364.411) when offered for sale, sold

or delivered shall be the price of the lowest-priced carcass or corresponding wholesale cut.

(i) *Zone 9.*

(2) *Beef carcass and beef wholesale cut prices applicable in Zone 9.* Subject to the provisions of paragraph (k) of this section, the Zone 9 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable Zone 4 price) plus \$1.50 per cwt.

(k) *Applicable zone price of miscuts.* For any beef wholesale cut which has been miscut or for any piece or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut.

§ 1364.453 *Schedule II: Amounts which must be deducted from zone prices listed in Schedule I.* As hereinafter provided, the following shall be deducted from the applicable zone prices:

(a) *For beef carcasses and beef wholesale cuts not graded by an official grader.* For the sale of any beef carcass or beef wholesale cut other than cutter or canner grade, which does not bear the grade mark and identification of an official grader of the United States Department of Agriculture at the time of sale, the seller shall deduct 12½ cents per cwt. from the applicable zone price.

(b) *Carload discount.* For all beef carcasses and/or beef wholesale cuts, and/or other meat items subject to this subpart B delivered in a straight or mixed carload shipment or sold as part of a straight or mixed carload sale, the seller shall deduct 75¢ per cwt. from the applicable zone price.

(c) *Wholesaler's quantity discount.* For beef carcasses and/or beef wholesale cuts sold to a wholesaler in a straight or mixed less-than-carload sale, the seller shall deduct 50¢ per cwt. from the applicable zone price.

§ 1364.454 *Schedule III: Amounts which may be added to zone prices listed in Schedule I.* Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

(2) *For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing*

or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25¢ per cwt.

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9 or 10, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point: the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this § 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the

point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt. in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: *Provided*, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged.

[Subparagraph (6) amended by Amendment 2, 8 F.R. 164, effective 1-8-43]

APPENDIX E:

CONSTITUTION OF THE UNITED STATES.

ARTICLE I.

Section 1.

All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

FIFTH AMENDMENT.

No person shall be . . . deprived of life, liberty or property without due process of law and

SIXTH AMENDMENT.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 375.

BENJAMIN ROTTENBERG AND B. ROTTENBERG
CO., INC., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONERS.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Petitioners.

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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 375.

BENJAMIN ROTTENBERG AND B. ROTTENBERG
CO., INC., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The memorandum of the District Court upon motion to quash (R. 59-67) is reported in 48 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 69-82) is reported in 137 F. (2d) 850.

Jurisdiction.

Petitioners filed a petition for a writ of certiorari in this Court on September 22, 1943, which was allowed on November 8, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U.S.C. Sec. 347 (a)) and Rule 38 of the Revised Rules, 1939, of the Supreme Court of the United States.

Case Stated.

The petitioners were convicted by a jury after trial in the United States District Court for the District of Massachusetts upon indictments numbered 16074 and 16075 (R. 1-13) charging them in twenty counts with the sale and delivery of wholesale beef cuts at prices higher than the maximum prices established under Revised Maximum Price Regulation No. 169, as amended, allegedly issued and effective pursuant to the provisions of the Emergency Price Control Act of 1942 (P.L. No. 421, 77th Cong.), 56 Stat. 23, as amended by the Inflation Control Act of 1942 (P.L. No. 729, 77th Cong.), 56 Stat. 765.

The petitioner Benjamin Rottenberg was sentenced on March 10, 1943, to pay a fine of \$1000 and to serve a term of six months in jail (R. 26-27). The petitioner B. Rottenberg, Inc., was sentenced on the same date to pay a fine of \$1000 (R. 54-55).

The petitioners filed an appeal to the United States Circuit Court of Appeals for the First Circuit upon various grounds presented in the motion to quash (R. 14-19) and amendment to motion to quash (R. 19-20); upon the Court's refusal to direct a verdict of not guilty on count 1 for variance, in each indictment, and upon the Court's refusal to give certain requests for rulings and instructions (R. 38-41); upon the Court's overruling the motion for a new trial as appears in the motion (R. 25-26), and the Court's denial of a motion in arrest of judgment upon the grounds stated therein (R. 23-24).

The Circuit Court of Appeals for the First Circuit on August 23, 1943, handed down an opinion affirming the judgments and sentences of the District Court (R. 69) and entered judgment (R. 86).

The Circuit Court of Appeals in its opinion did not consider certain questions raised by the petitioners but decided the case upon the following main grounds: *First*. That the Act challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator was a point not well taken (R. 85). *Second*. That Section 204 (d) of the Act (56 Stat. 26) deprived the United States District Court in criminal proceedings from considering the validity of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), as amended (R. 83), and the District Court, upon a criminal trial, was precluded from receiving any evidence as to the invalidity of the Regulation upon which the indictment was based (R. 79), and that persons failing to file a protest with the Administrator under Section 203 and follow the procedure for review outlined in Section 204 of the Act were precluded from challenging the validity of the Regulation when brought into court as defendants upon a criminal indictment.

Although the question was raised in the pleadings and brief that the Regulation upon which the case was tried was a joint regulation, under the Emergency Price Control Act, the Inflation Control Act and Executive Order No. 9250 (7 Fed. Reg. 7871); no consideration was given to the question of whether the Regulation was *issued* under Section 2 of the Act, which, under the Act itself, is the only case where the "exclusive jurisdiction" of the Emergency Court under Section 204 (d) applies.

The District Court refused to consider evidence submitted upon the motion for a new trial (R. 25-26) and motion in arrest of judgment (R. 23-24) to the effect that the

Price Administrator had declared that the law had not been followed in issuing the Regulation, said refusal being predicated upon the sole ground that Section 204 (d) of the Act precluded the Court from considering the validity of the Regulation (R. 68), and this question was not passed upon by the Circuit Court of Appeals.

Laws, Statutes and Regulations Involved.

This case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C., Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Inflation Control Act of October 2, 1942 (56 Stat. 765, 50 U.S.C., Appendix, Supp. II, Sec. 961 *et seq.*), which are set forth in the Appendix.

Pertinent provisions of the Emergency Price Control Act are Sections 1 (a), 2 (a), 2 (c), 2 (d), 2 (h) and 4 (a). Section 203 sets out the protest procedure and Section 204 the Emergency Court review procedure, with Section 204 (d) giving that Court exclusive jurisdiction to determine the validity of a regulation issued under Section 2. Section 205 (c) confers exclusive jurisdiction of criminal proceedings for violations of Section 4 of the Act upon the District Courts, and the penal provisions are in Section 205 (b) and definitions as used in the Act are in Section 302.

Pertinent provisions of the Inflation Control Act are Sections 1, 2 and 3, and the penal provisions are in Section 11.

There is also set forth a pertinent section of Executive Order No. 9250 (7 Fed. Reg. 7871).

Applicable sections of the Constitution of the United States are also set forth in the Appendix.

The applicable provisions of Revised Maximum Price Regulation No. 169 are Sections 1364.451 to 1364.455, inclusive (7 Fed. Reg. 10385-10392), establishing maximum prices for sales of wholesale cuts of beef, and Section

1364.401 (*id.* 10382), prohibiting sales at prices above the legal maximum.

Questions Presented.

1. Whether the Emergency Price Control Act is unconstitutional by reason of indefiniteness of the enumerated subjects in Section 1 of the Act and unlawful delegation of legislative power, contrary to Article I, Section 1, of the Constitution of the United States.

2. Whether the trial judge and the Circuit Court of Appeals were correct in their rulings that, upon a trial of a criminal indictment against the defendants, they were precluded from questioning the validity of the regulation upon which the indictment was based.

3. Where the defendants, upon their trial of a criminal indictment, raise questions of law to the effect that no crime was committed because the statute only made it a crime to violate a regulation issued under Section 2 of the Act, and the regulation upon which the indictment was founded was outside the mandate of Congress, can the Courts below pass over and refuse to rule upon such questions?

4. Where the Emergency Price Control Act of 1942 in Section 205 (e) has given jurisdiction of criminal proceedings to the District Court, can the power of that Court be limited or restricted by the provisions of Section 204 (d) so as to deprive a citizen from presenting any legal defense?

5. Whether the defendants have been deprived of their rights under the Fifth Amendment to the Constitution by taking of their liberty and property without due process of law.

6. Whether the defendants have been deprived of their rights under the Sixth Amendment to the Constitution to

be tried in the state and district wherein the crime shall have been committed, with the power to raise all defenses which they might make in any criminal case.

Summary of Argument.

1. The Emergency Price Control Act is unconstitutional by reason of the unlawful delegation of legislative power and the indefiniteness of the enumerated subjects in Section 1 of the Act, contrary to Article 1, Section 1, of the Constitution of the United States.

(a) The Act is unconstitutional by reason of indefiniteness of the stated purposes and embraces matters over which Congress has no right to legislate.

(b) Considering the enumerated purposes set out in Section 1, there has been an unlawful delegation of authority by Congress to the Administrator. The Act gives to the Administrator a discretionary right to determine the necessity, time and manner of performance of an Act as his judgment might suggest.

2. The Court below was in error in holding that it was precluded by Section 204 (d) of the Act from entertaining defense which the defendant might offer to show that the Regulation was not issued in conformity with the law.

(a) It was the duty of the Court to determine whether there was a legal regulation upon which the defendants could be tried and convicted of crime. The regulation was not issued under Section 2 of the Act and was outside the delegated powers of the Administrator, but the Court ruled that it had no authority to question a regulation once issued. The regulation was issued under purported authority emanating from different sources carrying different penal provisions and leaves defendants in doubt as to the exact crime of which they were convicted.

(b) The conferring of jurisdiction upon the District Court of criminal proceedings for violation of Section 4 of the Act carries with it all the powers incident to jurisdiction. It was the duty of the Court to determine whether its jurisdiction attached to a regulation upon which an indictment was brought, and this, of necessity, requires inquiry into the content of the regulation.

(c) Section 204 (d) of the Act is not applicable to criminal prosecution and was only intended to apply to matters wherein the persons affected seek affirmative relief.

(d) Cases cited and contentions of the Courts below in the opinion are distinguishable.

3. If Section 204 (d) does withdraw from the District Court the right to determine in criminal proceedings whether the indictment is founded upon an illegal, arbitrary and capricious regulation, it is unconstitutional.

(a) In conferring jurisdiction over all criminal proceedings for violations of Section 4 of the Act, it became the obligation of the District Court to carry into effect all powers attending the exercise of its jurisdiction. Congress could not constitutionally prevent the Court from determining the legal content and effect of a regulation upon which an indictment was founded, or require the Court to approve a regulation without ruling upon its legal merits.

(b) The remedies provided under Sections 203 and 204 are inoperative, ineffectual and chimerical. The protest and review procedure, so far as it relates to criminal proceedings, deprives defendants of due process of law as guaranteed under the Fifth Amendment and denies the right to a full trial before a jury in the district where the crime was alleged to have been committed.

Argument.**I.**

The Emergency Price Control Act is unconstitutional by reason of the unlawful delegation of legislative power; the speculative character of the facts to be found by the administrator, and the unlimited powers and discretion given to the Price Administrator to accomplish the purposes of the Act.

A.

It is contended, first, that so far as applicable to these indictments the Act itself is unconstitutional by reason of indefiniteness of stated purposes.

The general rule is stated in—

Cooley's Constitutional Limitations (8th Ed.),
vol. 1, at page 229:

“The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply.”

Section 1 (a) declares it to be in the interest of the national defense and security necessary to the effective prosecution of the present war—

“to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissi-

pated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of valued;"

No further declaration has been made by Congress in the Act in reference to the above-enumerated subjects, other than to provide in Section 2:

"Whenever in the judgment of the Price Administrator (provided for in Section 101) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

It must be assumed the only manner and means by which the purposes of the Act are to be carried out are by the establishing of maximum price or prices as in the judgment of the Administrator will effectuate the purposes. That is to say, every enumerated purpose in Section 1 (a) can be carried out by the establishing of prices when it has been determined by an Administrator that the price or prices of commodities have risen or threaten to rise in a manner inconsistent with the enumerated purposes.

The power of Congress provides for the common defense granted under provisions of Article 1, Section 8, and that right is not questioned. In the exercise of that power—

“from its very nature; the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law, . . .”

United States v. McIntosh, 283 U.S. 605-622—

although—

“extraordinary conditions do not create or enlarge constitutional power.”

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398.

The constitutional authority for the enactment by Congress of this legislation is derived from Article 1, Section 8, Clause 18, of the Constitution, sometimes called the “implied power” or “elastic clause,” which reads as follows:

“The Congress shall have power . . . To make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.”

Fairbank v. United States, 181 U.S. 283.

Some thought must be given to the question of whether the purposes of Section 1 (a) are within the granted powers to Congress or reserved under the Tenth Amendment to the Constitution:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The terms "stabilize prices," "speculative," "unwarranted," and "abnormal increase in prices and rents," "and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the National Emergency," "persons with relatively fixed and limited incomes," "undue impairment of their standards of living," are terms of general and indefinite meaning, the determining of the application of which is not fact finding but the exercise of discretionary power.

There is no declaration by Congress in Section 1 (a) that the establishment of maximum price or prices will effectuate the purposes of the Act, and the direction to the Administrator to establish prices when, in his judgment, prices of commodities have risen or threaten to rise to an extent or manner inconsistent with the purposes neither supports nor contradicts the question whether the purposes of the Act can be accomplished or not.

"... protect persons with relatively fixed and limited incomes, consumers, wage earners, investors; and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; ..."—

is clearly without the power of Congress to legislate on, even though it be assumed that it relies upon Article 1, Section 8; of the Constitution:

"To provide for the common defense and general welfare of the United States."

The emergency character of the Act clearly indicates that Congress acted under the power "to provide for the common defense" and did not base the legislation upon the power to provide for the "general welfare." Congress did

not intend the legislation to apply both to the "common defense" and to the "general welfare" as well.

"To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; . . ."—

is objectionable because it is discriminatory and selects as beneficiaries five separate classes of individuals, contrary to the provisions of Article 4, Section 2, of the Constitution;

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—

and Article 9, Amendments to the Constitution of the United States:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Assuming that the purpose referred to can meet the test of constitutionality, the phrase "from undue impairment of their standard of living" presents additional objection.

Article 1, Section 8, recites:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

Here, if at all, rests the power to determine by legislative fiat (referring to the inhabitants, alien and citizen) "their

standard of living." The temporary character of the Act is indicated by its title: "The Emergency Price Control Act." Upon the ending of the present war, the Congress by resolution, or the President by proclamation, may terminate the Act.

There is no suggestion that the "standard of living" (Section 1) is to be maintained beyond the termination of the Act, which confines the decision of the Administrator or the courts to the period of the present war.

It might be logical to assume that, if an Administrator would determine and define the standard of living of America for a temporary period, he could determine it for a full generation or more.

In arriving at such a finding, the different elements of our complex life must receive full consideration, there being only one basis of legislation that meets the test of the self-evident truths as testified in the Declaration of Independence.

Dean Sutcliffe in "What About the American Standard of Living?" in *Bostonia*, Boston University Alumni Magazine, February, 1943, states:

"During these hectic war days, one is constantly hearing statements as to the effect of war on the American standard of living. There are those who argue that the Lease Lend Act will so reduce the supply of goods and services available to the American people that there will, of necessity, be a lowering of the American standard.

"On the other extreme are those who point out that never in the history of the American nation has the national income been so high. Who is right? No one can say since the term 'standard of living' is a generalization which is supposed to characterize 130,000,000 people, which is, of course, absurd.

"We, as consumers, are already familiar with price control under the Office of Price Administration. These controls do protect the citizens from inflation, but at the same time do not necessarily safeguard the standard of living of the various income groups. They merely stabilize at current levels. Millions of white collar workers have not participated in the increased national income; yet prices, though now stabilized, have gone up so that the power to command commodities has decreased, . . . but they [price controls] do not protect, as some would have us believe, the standard of living for every citizen."

This analysis might be construed that there is an American standard of living, yet it leaves open the suggestion of Dean Sutcliffe that it is a "generalization which is supposed to characterize 130,000,000 people," and the writer amplifies, "of course, this is absurd."

If the Act leaves to a ministerial officer the definition of the thing to which it is to be applied, such definition must be commonly known; otherwise, it is an unlawful delegation of legislative power.

People v. Yonker (1932), 351 Ill. 139, 184 N.E. 228.

There is no legal definition of the phrase "standard of living." It has never been a fiat of any legislation, nor adopted as a fundamental precept of any party or political organization, either in Europe or America.

Statistics have been marshalled which result in the estimate that the American standard of living is higher than that of any other nation in the world; but comparative figures or conclusions do not satisfy the inquiry. What is

the American standard of living? Upon what basis is it determined, or to be determined?

In an economic democracy, any standard of living established by the government must bear with even effect on every one entitled to the protection of that government. To classify into groups would be impractical and destructive of the government itself, which can only endure as a democracy, gathering its vitality and life from the masses which make up its numbers, and through them alone.

Could the climatic conditions of the South, which favors the people of that section, lower food and living costs because of the suburban character of its towns and cities and other economic factors which are absent in the congested industrial centers of the North, with the increased cost of foodstuffs, due to the distances from the source of food, be classified under a similar standard of living? What does the phrase mean in such a case? Assume the necessity wants of both are the same; no standard of living could equally be applied to both, because the conditions of both are different and cannot, because of natural reasons, ever be reconciled. If this be so, is it violative of the expressed limitations upon which this Government rests?

If one is satisfied with his mode of life, if his income is sufficient to support his happiness and provide for him what he believes are his essential wants, surely no law ought to compel him to enlarge upon his philosophy for the benefit of those whose views are different.

A standard is an authoritative or generally accepted model or measure by comparison with which the quantity, excellence and correctness of other things may be determined.

Living is especially offered to that which one earns in order to keep alive. In this sense the word often implies what is sufficient to live on economically, but not sufficient for luxury.

To issue a Regulation under Section 2 (a) of the Act, "to prevent undue impairment of their standard of living," where Congress has not established a "standard of living," and, as it is contended, cannot within the granted powers of the Constitution declare a "standard of living," the Administrator, in issuing the Regulation, determines the "standard of living" of the enumerated persons, which is beyond any power ever exercised in the history of the law.

The general characterization, "standard of living," can be construed beyond the physical needs of a person, and includes mental and moral needs and opportunities. Such a construction permits the application of the fundamental rule:

"The concession of such a power would open the door to unlimited regulation of matters of State concerned by Federal authority.

"The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens, speaking through their representatives."

United States v. Constantine, 296 U.S. 287, 296.

This Court, in discussing the phrase "general welfare," declared in *United States v. Butler*, 297 U.S. 1, 64:

"The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted, 'it is obvious that under color of the generality of the words, to 'provide for the common defense and general welfare,' the Government of the United States is in reality a government of general and unlimited powers,

notwithstanding the subsequent enumeration of specific powers." "

Story, Commentaries on Constitution of the United States (5th Ed.), Vol. 1, Sec. 907.

Such a general term as "standard of living" is wholly inadequate as a standard for administrative action, and requires a most unique construction to permit of Regulation No. 169, Section 1364.451, upon which the indictment is based.

As a preliminary, the Administrator is required to determine that the price or prices of commodities have risen or threaten to rise to an extent inconsistent, at least, with the protection of persons with fixed and limited incomes from impairment of their standard of living. There must be a determination of fact as to who the persons are with relatively fixed and limited incomes, their numbers, status at law, points of domicile, sources of income and mode of life as of the time of the issuance of the Regulation. These facts should be determined in accordance with the provisions of the Constitution and the established standard should bear true relationship to the welfare of all the citizens.

"Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality."

Arkansas Gas Co. v. R.R. Commission, 261 U.S. 379.

"To be constitutional, the law must bear equally upon all engaged in a like business."

Missouri v. Lewis, 101 U.S. 22.

Reagan v. Farmers L. & T. Co., 154 U.S. 362, 399.

Barbier v. Connolly, 113 U.S. 27.

Gulf Ry. Co. v. Ellis, 165 U.S. 150.

Such general terms as are in Section 1 (a) are wholly inadequate as standards for administrative action, are not within the powers granted to Congress by the Constitution, and are violative of Article 10 of the Amendments to the Constitution.

On any reasoning, defining the meaning of the words expressing the purposes of the Act becomes more disturbing and permits a reference to the statement of this Court:

“And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in Section 1 of Title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.”

Schechter v. United States, 295 U.S. 495, 537.

B.

There has been, considering the enumerated purposes set out in Section 1, an unlawful delegation of authority by Congress to the Administrator.

Is the determining or finding of the Administrator the making of law, or is it based upon the exercise of authority and power properly delegated to him?

In *J. W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), Mr. Chief Justice Taft said, at page 407:

“The true distinction, therefore, between the delegation of power to make the law, which necessarily involves a discretion as to what it should be and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law, the

first cannot be done; to the latter, no valid objection can be made."

The Emergency Price Control Act does not set forth definite rules or standards to guide the Administrator and permit him to use his discretion as to when these rules and standards should be carried into execution.

The directions to the Administrator in Section 2 (a) that he shall "so far as practicable" give due consideration to the prices prevailing between October 1 and October 15, 1941, are advisory and not definite, because of the further statements:

"If there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions . . . or other cause . . . then to the prices prevailing during the nearest . . . two-week period . . . in which, in the judgment of the Administrator, the prices are generally representative."

There is no basic period to which he must confine himself.

Congress has not required the Administrator to use the figures existing between October 1 and October 15, but merely to consider them, and once he has considered them, he may reject them and arbitrarily adopt such time period as satisfies his individual opinion. This is challenged as a delegation to the Administrator of legislative power.

On April 28, 1943, the Administrator issued General Maximum Price Regulation (7 Fed. Reg. 3153, 3330, 3666, 3990, 3991, 4339), and established as the maximum price for wholesale meat cuts the highest price charged by the seller during the month of March, 1942, for the same commodity.

On June 19, 1942, Maximum Price Regulation No. 169 (7 Fed. Reg. 4653) was issued, establishing the maximum price to be the highest price actually charged by the seller, during the period March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of seller's sales were made during such period.

On December 10, 1942, Revised Maximum Price Regulation (7 Fed. Reg. 10381) was issued establishing specific prices, by zones, throughout the United States at a level slightly above that which prevailed between March 16 and March 28, 1942.

Section 302 of the Act defines the term "commodity" to mean "commodities," "articles," "products" and "materials" (with certain exceptions). Commodities are generally classified as meaning all articles of trade and commerce.

It is apparent, therefore, that provisions of Section 2 permit the Administrator to find that the price or prices of every article of trade or commerce within the Nation have risen or threaten to rise in a manner inconsistent with the purposes of the Act, and to use as the basis for such determination the prevailing prices of all articles of trade and commerce over any two-week period which, in his judgment, are representative.

There is no standard which controls the exercise of his discretion and he is free to act as far as his judgment suggests in the control of our national economy.

Under the terms of the Act the necessity, time and occasion of performance have been left to the discretion of the Administrator.

In *Schechter v. United States*, 295 U.S. 495 (1935), Mr. Justice Cardozo states at page 551:

"This Court has held that delegation may be unlawful, though the act to be performed is definite and

single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate."

Under Section 2 the Administrator may, as has been done in the instant case, control meat and refuse to control live-stock from which it is processed.

To borrow the words of Mr. Justice Cardozo, *Schechter v. United States*, *supra*, at page 553:

"This is delegation running riot. No such plenitude of power is susceptible of transfer."

Where Congress has left it to the Administrator to determine that prices of all articles of trade or commerce have reached a point where they are inconsistent with the purposes set out in Section 1 of the Act, then Congress has permitted the Administrator to define and create a crime.

Here Congress has not established the standard of legal obligation, but has attempted to transfer that function to the Price Administrator in an unconstitutional delegation of legislative power.

Assuming that the enumerated purposes of Section 1 are necessary to the effective prosecution of the war, although Congress has not definitely declared that they are, and the method by which the purposes to be accomplished are not set up, there must be fixed or definite standards upon which an administrative officer can act.

J. W. Hampton & Co. v. United States, 276 U.S.
394.

To permit the Administrator, in his judgment, based upon such matters as he may elect to consider, to fix the time period upon which prevailing prices should be estab-

lished, as the standard, is to supply the deficiency in Section 1 (a), and is an unconstitutional delegation of legislative authority.

"If, by the terms of an act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power, and the act is void. Such a determination of legislative expediency can be made by the legislature alone."

Williams v. Evans (1917), 139 Minn. 32; 165 N.W. 495; L.R.A. 1918F, 542.

Nothing prevents him from selecting one time period upon which there can be a prosecution and likewise select another time period upon which there can also be a prosecution, although the regulations themselves could be exactly alike, excepting the time period.

Where the Act provides that a violation of a regulation shall be punishable by fine or imprisonment the construction of penal statutes must be followed, and it cannot be suggested that an administrative officer be permitted such latitude in issuing a regulation upon which a valid indictment can be returned.

This Court said in *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1924) (referring to criminal prosecutions founded on indefinite standards), at page 239:

"It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no standard at all."

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1920).

II.

The Court below was in error in holding that it was precluded by Section 204 (d) of the Act from entertaining a defense which the defendant might offer to show that the Regulation was not issued in conformity with law.

A.

It was the duty of the Court to determine whether there was a legal regulation upon which the defendants could be tried and convicted of crime.

This is a power inherent in the trial upon any indictment charging the commission of a crime. The indictment (R. 1-13) provided:

"On or about the 10th day of December, 1942, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169 . . . At all times hereinafter referred to, said Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942, (Public Law 421, 77th Cong.), Approved January 30, 1942."

The motives of an honest and efficient Administrator, as set out in the Circuit Court of Appeals opinion (R. 78), and the difficulties of enforcement (R. 78-79), cannot be substituted for the constitutional rights of a citizen and those rights subjugated to the "practical necessities of administration." Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan*, 293 U.S. 388, at page 432, said:

"If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or

of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission. . . ."

Section 2 (a) of the Act sets forth the circumstances under which a regulation may be issued by the Administrator, and the manner in which such regulation is to be issued.

The Act was amended by the Inflation Control Act (50 U.S.C., Appendix, Supp. II, Sec. 961 *et seq.*), which specifically provided in Section 3 that—

" . . . in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing."

In *Commonwealth v. Anthes* 5 Gray (Mass.), 185, 188-189, Mr. Chief Justice Shaw said:

"Every criminal prosecution therefore necessarily involves two very distinct inquiries: First. Is there such a law as it is alleged in the indictment that the person accused has violated? Second. Has the person accused done the act or acts, which it is alleged in the indictment he has done?

"It will be at once perceived that, in resolving the first question, the inquiry divides itself into several distinct inquiries, namely:

"1. Supposing the prosecution to be on a statute, is there any such legislative enactment?

"2. Does the statute, when expounded according to the rules of law, according to the true intent of the legislature, bear the meaning and interpretation put upon it in the indictment, so as to bring the acts

charged against the defendant within the true meaning of the statute, and render him liable to the penalty of it?

"3. Is it within the constitutional power of the legislature, as fixed and limited by the Constitution of the Commonwealth; or does it exceed those limits, so that, although it has all the forms of law, it wants the vital energy, which can only be breathed into it by the Constitution, and therefore is inoperative and void?"

Again at page 192 he said:

"Such then is the nature and character of a criminal prosecution in every system of jurisprudence; it necessarily embraces two questions: first, whether there is such a law as the indictment assumes; and next, whether the accused has violated it."

In all criminal trials according to the settled principles of the common law—the kind of trial guaranteed by the Sixth Amendment—two questions are involved: *First*, whether there is such a law as the defendant is charged with violating; and *second*, whether he has violated that law. And it follows necessarily that, in criminal trials according to the settled principles of the common law, the Court has not only the power but the duty to say what the law is.

In the early case of *Marbury v. Madison*, 1 Cranch, 137 (1803), at page 177, the Court said:

"It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary

means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

In *Bowles v. United States*, 319 U.S. 33 (May 3, 1943), Mr. Justice Jackson stated in his dissenting opinion, on pages 37-38 (Mr. Justice Reed concurring):

"the ultimate question raised by *Bowles* is whether one indicted for failing to submit to an induction order [of a Selective Service draft board] may defend by showing that the order is invalid . . . The Court does not consider whether one may be convicted for disobeying an invalid order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the Court precludes its determination of the question. *But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made.*" (Italics supplied.)

In the issuance of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10,381) the Price Administrator, as a condition precedent to the issuance of the Regulation, made the following finding:

"In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for veal carcasses and wholesale cuts and processed products the prices prevailing with respect thereto during the period March 16 to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in Sections 1364.451, 1364.452, and 1364.476. The Price Administrator has ascertained and given due consideration to the prices of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practical, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

"In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register.

“The maximum prices established herein are not below prices which will reflect to producers of the agricultural commodities from which beef and veal carcasses and wholesale cuts and processed products are produced a price for their products equal to the highest of the prices required by the provisions of the Emergency Price Control Act of 1942, as amended, and by the Executive Order of October 3, 1942.”

From this statement in issuing R.M.P.R. No. 169, upon which these indictments are based, the Administrator determined in his judgment, not that it would effectuate any particular enumerated purpose, but that it was necessary and proper to effectuate the purposes of the Emergency Price Control Act of 1942, the Inflation Control Act, and Executive Order No. 9250, issued by the President on October 3, 1942.

His conclusions are amplified by the further statement:

“In the judgment of the Price Administrator, the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order.”

Here, if anywhere, is the record of the exercise of the administrative power pursuant to the provisions of Sections 1 and 2 of the Price Control Act. The Administrator has not made findings of fact and shown his determinations as required by law.

Panama Refining Co. v. Ryan, 293 U.S. 388, 432-433.

The requirement of findings is far from a technicality. It is a means of guaranteeing that cases shall be decided ac-

according to the evidence and the law, rather than arbitrarily or from extra-legal considerations. And they serve the additional purposes of apprising the parties and the reviewing tribunal of the factual basis of the agency's action, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extra-legal considerations.

Vom Baur, *Federal Administrative Law*, p. 537 ff.

Failure of an administrative officer to make a clear finding showing that it has applied the legislative mandate given him would render his action invalid.

Panama Refining Co. v. Ryan (1935), 293 U.S. 388, 432.

"Officers and bodies such as those may be required by reviewing courts to express their decision in formal and explicit findings to the end that review may be intelligent. [Citing cases.]"

Panama Refining Co. v. Ryan (1935), 293 U.S. 447.

And at page 448:

"If legislative power is delegated, subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment there is, in truth, no delegation and hence no official action but only the vain show of it."

"We held that the order in that case [*Wichita R.R. & Light Co. v. Public Utilities Commission*, 260 U.S. 48] made after hearing and ordering reduction was

void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

Mahler v. Eby, 264 U.S. 32, 44.

The Administrator in his findings recites:

"In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act."

This phrase "effectuate the purpose of this Act" and its relation to the enumerated purposes has, in a somewhat similar legislation, National Recovery Act, Sec. 1, been criticized by this Court:

"... that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the 'Declaration of Policy'.

"Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the

creation by the President of administrative agencies, to assist him, but the action or reports of such agencies, or of his other assistants,—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which Section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

“Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies.

Schechter v. United States, 295 U.S. 495, 538-539.

“... To hold that he is free to select as he chooses from the many and various objects generally described in the first section and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.”

Panama Refining Co. v. Ryan, 293 U.S. 388, 431, 432.

Nothing is added to the findings by the statement:

“The maximum prices established by this Regulation are and will be generally fair and equitable.”

This again, as the Court has stated:

"is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws."

Schechter v. United States, 295 U.S. 495.

It requires more than his judgment and declaration that the prices established by his official action will be generally fair and equitable and will effect the purposes of the Price Control Act and the Executive Order of the President himself.

A democracy cannot endure when its vital needs, such as food, clothing and housing, become subject to the judgment of any individual, no matter how endowed he may be with the talents that such a responsibility requires.

For the Regulation upon which this indictment is based to conform to requirements of law, there should be some approach to express and definite findings, and these findings must be more than conclusions or opinions, not with an exactness which will make the law static or prevent the war from being successfully determined, but shall rest upon findings of fact, supported by substantial evidence and within the comprehension, not alone of the reviewing body, but of all those whom it is intended to regulate.

Section 2 (a) of the Act requires:

"Every regulation or order issued under the foregoing provisions of this section shall be accompanied by a Statement of Considerations involved in the issuance of such regulation or order."

The Statement of Considerations (O.P.A. Document No. 8175), which Section 2 requires should accompany every regulation, does not appear to have been printed in the

Federal Register, as required by law, and is handed to the Court as a separate appendix. It discloses (a) the nature of the beef industry; (b) history of price action; (c) recent price relationships; (d) the maximum prices established by Revised Maximum Price Regulation.

In not one single line does it point out or even consider any reference to the enumerated purposes of Section 1 of the Act. It is without legal objective, silent as to its application, and its interpretation is left with one's own economic theory.

The District Court has had jurisdiction conferred upon it by Section 205 (c) of the Act.

Section 4 (a) of the Act provides that:

“ . . . it shall be unlawful . . . to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 . . . ”

The provisions of Section 4 (a) do not render it a crime to violate *any* regulation but only such regulation or order as is *issued under Section 2*. It therefore became the responsibility of the District Court to determine whether the regulation upon which the indictment was founded was *issued under Section 2*.

The Courts below gave no consideration whatsoever to a determination of whether, as a matter of law, the regulation was issued under Section 2 and stated that Section 204 (d) of the Act precluded consideration of that question. This interpretation by the Courts below leaves a defendant in the position where he could be indicted for violation of *any* regulation and be convicted of crime, because Section 204 (d) precludes a determination by them of the content of the regulation, notwithstanding that Section 4 (a) makes it a crime to violate a regulation *only* “issued under Section 2.”

Revised Regulation No. 169 (7 Fed. Reg. 10381) recites that it was promulgated under the exercise of the powers conferred upon the Administrator by the Emergency Price Control Act, the Inflation Control Act and Executive Order No. 9250 (7 Fed. Reg. 7871). The Regulation specifically states that the Administrator has jointly exercised the powers originating from separate sources.

In spite of the limitation of the purposes of the Inflation Control Act authorizing the President—

“To issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; . . .”—

the President has authorized the Administrator to control not only prices, wages and salaries, but profits as well.

“TITLE V—PROFITS AND SUBSIDIES—EXECUTIVE ORDER No. 9250.

“The Price Administrator in fixing, reducing or increasing prices shall determine price ceilings in such a manner that profits are prevented, which in his judgment are unreasonable or exorbitant.”

In the Second Intermediate Report, Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., 1st Sess., November 15, 1943, pp. 12-13, the Committee says:

“Notwithstanding the plain provisions of the Act, your Committee has found, . . . a well-devised and planned scheme to control the profits of American Industry . . . The Office of Price Administration has no legal right or authority to formulate such a plan or attempt to put such a plan in effect.”

The proffered testimony during the course of the trial (R. 32-37) and in support of the motion for a new trial(R.

25-26) was denied upon the sole ground that the Court was precluded from considering the validity of the Regulation (R. 37-68).

The denial of the motion for a new trial was not based upon the judge's discretion.

The Circuit Court of Appeals in its opinion (R. 78-79) upholding this interpretation of the Act renders the language of Section 4 (a) meaningless, and makes the return of an indictment alleging the violation of any regulation conclusive and binding upon the Court in criminal proceedings.

This interpretation is in the teeth of Section 205 (c), which gives it exclusive jurisdiction over all criminal matters. How can it determine, as a matter of construction, whether a crime as set out by Section 4 (a) has been committed unless it first determines whether the regulation or order was issued under Section 2?

The defendants submit that Section 204 (d) as construed by both Courts must be unconstitutional as denying them due process of law under the Fifth Amendment to the Constitution and the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed as guaranteed by the Sixth Amendment.

In *Fasulo v. United States*, 272 U.S. 620, 629 (1926), Mr. Justice Butler said:

"There are no constructive offenses, and before one can be punished, it must be shown that his case is *plainly within the statute.*" (Italics supplied.)

See also *Williamson v. United States*, 207 U.S. 425, 462 (1908).

Viereck v. United States, 318 U.S. 236, 241 (1943).

The Price Administrator, in adopting the price schedule without allowing any margin for processing, was not merely acting unreasonably or arbitrarily; he was acting without any statutory authority at all.

In speaking for the Supreme Court in *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1918), Mr. Justice Brandeis said at page 562:

"If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission [citing cases]; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law [citing cases]. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is *void*. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." (Italics supplied.)

Defendants' attack goes to the *jurisdiction* of the Administrator, as the United States Supreme Court said in *Crowell v. Benson*, 285 U.S. 22 (1931), at page 63:

"The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration *in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable.*" (Italics supplied.)

Assuming, *arguendo*, that the Courts below were correct in their interpretation, how could a defendant under indictment ask the District Court to suspend its trial while he goes to the Emergency Court of Appeals for a determination of the character and legal force of the regulation upon which the indictment is founded?" If our system of conduct of criminal trials permitted the defendant to take such action, would not the Emergency Court of Appeals immediately reply that jurisdiction of any criminal proceedings was expressly denied to that Court by the language of Section 205 (c), and further that it was not a Court of original jurisdiction or a trial Court like the District Court, but that its function was solely limited to a review under the protest procedure outlined in Section 203 of the Act?

The writings indicate that it is the duty of a Court on a criminal trial for violation of an administrative regulation to make a determination of whether the regulation forms the basis of criminal responsibility.

"Assuming that the defendant has violated a departmental regulation, for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers conferred upon the department by Congress. Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits designated by Congress."

Note, Validity of Federal Departmental Regulations Involving Criminal Responsibility, 35 Harv. L. Rev. 952. (1922).

And see Administrative Penalty Regulation, 43 Col. L. Rev. 213, footnote 2 (March, 1943):

"United States v. Eaton, 144 U. S. 677 (1892); United States v. 11,150 Pounds of Butter, 195 Fed.

657 (C.C.A. 8th, 1912); and *St. Louis Merchants' Bridge Ry. Co. v. United States*, 188 Fed. 191 (C. C. A. 8th, 1911) were cases where the statutes explicitly made violations of proper administrative rules criminal, and the holdings were that the rules in question were unauthorized and, therefore, failure to conform not criminal."

See also 37 Ill. L. Rev. 256 (Nov.-Dec. 1942),
Judicial Review of Price Orders under the
Emergency Price Control Act:

"The only question subject to review is whether the Administrator has acted within statutory limits and in accordance with statutory standards."

"If the regulation was not issued in accordance with the authority conferred upon the Administrator, any action taken by him was a nullity.

This Court said in *Manhattan Co. v. Commissioners*, 297 U.S. 129 (1936), at page 134:

"The power of a representative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make laws,—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this but operates to create a rule out of harmony with the statute is a mere nullity. *Lynch v. Tilden Produce Co.* 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440."

The defendants in their offer of proof (R. 32-37) not only offered to show that the Regulation provided for no fair and equitable margin of profit, but that it was arbitrary,

capricious and illegal. The further offer of the defendants in support of their motion for new trial (R. 25-26) that the Administrator had disregarded the mandate of Congress as evidenced by the testimony of the Administrator himself before the subcommittee of the Senate Committee on Agriculture and Forestry held at Washington, D.C. on March 3, 1943, gave the defendants the right to have determined by the Court and jury whether the indictment was founded upon a legal regulation, violation of which was a criminal offense.

United States v. Eaton, 144 U.S. 677 (1892).

United States v. George, 228 U.S. 14, 22 (1913).

In *Clinkenbeard v. United States*, 21 Wall. 65 (1874), an Act of Congress provided that no suit should be maintained for the recovery of any tax erroneously or illegally assessed until an appeal first be made to the Commissioner of Internal Revenue. The Government brought suit to enforce collection of a tax which it had assessed. *Held*, the defendant was not precluded from setting up as a defense the erroneous assessment or illegality of the tax, although he had not appealed from the assessment.

The two leading bridge cases so indicate:

Union Bridge Co. v. United States, 204 U.S. 364 (1907).

Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910).

The correctness of the claim of the defendants has been supported by testimony of the Price Administrator before the Small Business Committee, Hearings before the Select Committee to conduct a study and investigation of the National Defense Program in its relation to small business in the United States House of Representatives, Seventy-

eight Cong. First Sess., on H. Res. 18, April 8 and 9, 1943,
Part 5 (Unrevised):

"The Chairman: Do you believe that law has been complied with, Mr. Brown?

"Mr. Brown: It is difficult for me to answer, Mr. Chairman. I think, to be perfectly frank, that it could be said that our regulation at times is in violation of that law, particularly that at the present time with respect to small packers. Now it is very largely a question of judgment. I don't know how or where you can draw the line and say so many small packers will of necessity fall down under a legal administration."

And the testimony of R. V. Gilbert, Economic Advisor to the Administrator, Hearing before the Committee on Agriculture, House of Representatives, 78th Cong. First Sess., October 26, 1943 (Unrevised) (p. 5):

"Mr. Kinzer: Let me ask you this question—are these attorneys, who now tell you you haven't a leg to stand on, the same ones who drew the order and the regulations (wholesale meat regulations) in the first place?

"Mr. Gilbert: That is right.

"Mr. Hope: They have changed their minds since that time?

"Mr. Gilbert: The situation is just as clear as a bell and it is not in our judgment, or in the judgment of anybody who has studied this problem, open to any real question. The price of livestock, on the average, throughout the 9 months, the first 9 months of this year, was \$1.47 above the level that was necessary to cover the total cost of the non-processing slaughterer. Now, under those circumstances, it can be demonstrated that, as a class, these people have been put into the

red, and have been put into the red to the extent of 1½¢ per pound on what they slaughter.

“Mr. Kleberg: And under the law they must be left with an equitable amount of profit?

“Mr. Gilbert: That is right. It puts us under an affirmative obligation to provide a generally fair and equitable margin for distributors. We have known for a long time, Mr. Chairman, that this situation existed.

“Mr. Kleberg: How long have you known it?

“Mr. Gilbert: We have known it since February of this year. . . .”

Page 30:

“Mr. Cooley: Did you say the Nagle decision is going to fix the date upon which live market prices reached a point which was too high and forced the violations? They are not going to undertake to fix any date, are they?

“Mr. Gilbert: The Court isn't. The Court is going to base its decision upon the prices we established and the costs which the non-processing slaughterer incurred. It is going to say that we were not allowing them a generally fair and equitable margin”

Page 37:

“Mr. Gilbert: Prentiss Brown testified before a Committee of the House or Senate months ago that in his judgment our regulation was illegal. That is a matter of public record and not all of our lawyers shared that feeling but all of our lawyers have thought that we were on awfully thin ice.”

Again, in House Report No. 898, Third Intermediate Report of the Select Committee to Investigate Executive Agencies, 78th Cong. First Sess., November 29, 1943, p. 1:

"Your committee finds that the Office of Price Administration has exceeded its powers and violated express provisions of the Price Control Act by setting maximum prices that were not generally fair and equitable upon meats on all levels between slaughterer and retailer . . .

"First. The Office of Price Administration by its order (MPR 169; 7 F. R. 10381) dated December 10, 1942, fixed ceiling prices at which meats must be sold by packers to retail butchers that were not generally fair and equitable and consequently violated Section 2 (a) of the Price Control Act, which provides: . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be *generally fair and equitable* . . ."

Defendants have been denied the right to show, ever since the return of the indictment against them, that the Regulation did not carry out the declared policy of Congress, although they have, at appropriate stages of the case (R. 70), endeavored to present their defense and have this question decided.

In his book *Federal Administrative Proceedings*, Walter Gellhorn (1941), p. 44, points out:

"There can be no depreciation of a passion for justice in law administration whether by judges or others."

See also McMahon, *Ordeal of Administrative Law* (1940), 25 Iowa L. Rev. 425, 435:

"The general assumption, therefore, should be that no good idealized in the theory of judicial justice will be sacrificed needlessly in the rise of administrative justice."

And Professor Robert L. Hale, in his article *Our Equivocal Constitutional Guarantees* (1939), Col. L. Rev. 563, states:

"In these days when individual liberty is being extinguished almost daily in new areas of Europe, we, in this country, may well pray to escape the course of totalitarianism . . . What we must do is to safeguard the more essential elements of liberty, not only by *limiting* the power of government to impose arbitrary restraints, but also by invoking the power of government to restrain the more powerful from imposing arbitrary restraints on the less powerful."

In *Jones v. Securities & Exchange Commission*, 298 U.S. 1, 23-24 (1936), Mr. Justice Sutherland said:

"The action of the Commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a Government of laws—because to the precise extent that the mere will is an official, or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the Government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency, the Courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches

and "slight deviations from legal modes of procedure. . . . It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principis*."

See Administrative Justice and the Supremacy of the Law, John Dickinson (1927), p. 307:

"... if the Commission [Interstate Commerce Commission] acts in disregard of a principle of law or without evidence to support its order, it acts without jurisdiction" (citing *Interstate Commerce Commission v. Louisville and Nashville R. Co.*, 227 U.S. 88).

In Review of Administrative Acts, Uhler (1942), footnote 5, p. 179, it is said:

"Relief from administrative action in many cases calls for review of the injurious and impeached act upon a statutory appeal . . . but the act complained of, if it is wholly void, can be collaterally attacked . . . by way of defense to prosecution of an alleged violation. See Stason, 24 A. B. A. J. 274 ff."

Section 205 of the Emergency Price Control Act provides for punishment up to \$5000 or imprisonment for not more than two years in the case of a violation of Section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Section 11 of the Inflation Control Act provides for a fine of not more than \$1000 or imprisonment for not more than one year, or both such fine and imprisonment upon conviction of willful violation of the Act.

If a defendant were indicted for violating a separate regulation issued under the Emergency Price Control Act, and, in the same count of that indictment, was charged with violating another regulation issued under the Inflation

Control Act, there would be no question but that that count of the indictment would be bad for duplicity.

By the action of the Administrator in combining the authority derived from both of these Acts in a single regulation (R.M.P.R. 169) an indictment founded upon violation of the regulation leaves a defendant in the position where he does not know whether he has violated one or the other statute. This question was raised by the defendants in their motion to quash the indictment (R. 14-19).

B.

The conferring of jurisdiction in criminal proceedings for violations of Section 4 of the Act upon the District Court carries with it all the powers incident to jurisdiction.

Congress recognized the constitutional right of the District Court over criminal cases.

The *jurisdiction* of the District Court, which was established by Congress under Article III, Section 1, of the Constitution, is vested by congressional enactment. Congress has determined that the District Court within the District of Massachusetts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States."

28 U.S.C. Sec. 41 (2).

18 U.S.C. Sec. 546, provides:

"The crimes and offenses defined in this title shall be cognizable in the district courts of the United States."

Section 205 (c) of the Emergency Price Control Act of 1942, as amended, provides that—

"The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act."

From the foregoing it is clear beyond controversy that Congress has vested in the District Court jurisdiction of criminal cases involving violations of this Act.

The question of jurisdiction has been discussed, and its meaning defined, in many cases.

Binderup v. Pathe Exchange, 263 U.S. 291, 305.

Foltz v. St. Louis & S.F. Ry. Co., 60 Fed. 316, 318.

Hopkins v. Commonwealth, 3 Met. (Mass.) 460, 462.

Hayward v. Superior Court in and for Los Angeles County, 130 Cal. (App.) 607, 610.

Morrow v. Corbin, 122 Tex. 553, 560.

In *Binderup v. Pathe Exchange*, 263 U.S. 291, the Court said at page 305:

“Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact.”

In *Foltz v. St. Louis & S.F. Ry. Co.*, 60 Fed. 316 (C.C.A. 8) (1894), the Court said at page 318:

“Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to the question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but includes every issue within the scope of the general power vested in the court, by the law of its organization to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine

every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, . . ." (Italics supplied.)

In *Hopkins v. Commonwealth*, 3 Met. (Mass.) 460, the Court said at page 462:

"To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, in a *regular course of judicial proceeding*."

In *Hayward v. Superior Court in and for Los Angeles County*, 130 Cal. (App.) 607, 610, the Court said:

"Jurisdiction is the power to hear and determine. Two steps, generally speaking, are necessary to the exercise of jurisdiction: 1. The ascertainment of the facts. 2. The application of law to the facts."

In *Morrow v. Corbin*, 122 Tex. 553, 560, the Court said:

"The jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes (1) the power to hear the facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the question of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, (5) and the power to execute the judgment or sentence."

The District Court is a constitutional Court:

Kuhnert v. United States, 36 Fed. Supp. 798;
aff. 124 Fed. (2d) 824 (C.C.A. 8).

Liberty Warehouse Co. v. Gramis, 273 U.S. 70,
76 (1926).

The judicial power vested in the District Court by the Constitution cannot, therefore, be limited, restricted or interfered with by legislative action.

Commonwealth v. Anthes, 5 Gray (Mass.), 185.

Merrill v. Sherburne, 1 N.H. 199.

Vaughn v. Harp, 49 Ark. 160, 162.

Houston v. Williams, 13 Cal. 24, 25.

C.

Section 204 (d) of the Emergency Price Control Act is not applicable to criminal prosecutions and was only intended to apply to matters wherein the persons affected seek affirmative relief.

In *Clinkenbeard v. United States*, 21 Wall. 65 (1874), the government brought suit to enforce collection of a tax. An Act of Congress declared that no suit should be maintained for the recovery of any tax erroneously or illegally assessed until an appeal first be made to the Commissioner of Internal Revenue and a decision had. The Court permitted the defendant to set up the defense that the assessment was erroneous although he had not appealed therefrom, saying (pp. 70-71):

“When the government elects to resort to the aid of the courts it must abide by the legality of the tax.”

In *Brown v. Wyatt Food Stores*, 49 Fed. Supp. 538 (March 8, 1943), the Court said in discussing the Emergency Price Control Act of 1942 (p. 540):

“There are two roads pointed in this statute. One is for the citizen in his protest, and his remedy. That road leads to the Emergency court at Washington, and to the Supreme Court. The other road is for the use of the Administrator. He enters court against the

citizen. That court is neither the Emergency court nor the Supreme Court. It is any state or national court which has jurisdiction of the controversy. It is the local court. That is the road upon which the parties arrive here. Show cause orders were issued to the defendant at the request of the plaintiff to exhibit to the court any reason he had why he should not be restrained.

"The general authority given to the Administrator to make regulations is that they shall be 'generally fair and equitable'.

"The defendant in accepting battle where it was begun by the complainant, does so by stating that the Administrator is seeking to enforce regulations that are not 'generally fair and equitable.' That there is another provision of the Act which vests 'exclusive jurisdiction' in the Emergency and Supreme court to pass upon 'validity' of regulations, and to stay orders made by the Administrator, is not a sufficient answer nor a sufficient program as to what shall take place in and upon this voyage.

"Whether the defendant shall get anywhere in its attack upon regulations made by the Administrator for the defendant's business, is beside the question. We do not need to argue that one may not enter court until he has exhausted his Administrative remedy. We all know that. The requirement for such entry is no novelty [citing cases].

"But it would be rather disappointing if the sovereign should declare that one of its representatives might enter a court to enforce its decrees against the citizen, and then deprive the citizen of his day in that court to speak against what is being attempted against him [citing cases]."

The procedure outlined by Sections 203 and 204 is intended as an administrative remedy, which had to be resorted to by one before he might look to the Courts for affirmative relief.

The doctrine of exhaustion of administrative remedies was a procedural step in equity which had to be followed before judicial processes for affirmative relief could be sought.

It has no application to a criminal prosecution.

See Raoul Berger, Exhaustion of Administrative Remedies, 48 Yale L.J. 981, 985-986 (1939).

It is a procedural step which postpones the right to claim judicial relief until all administrative remedies have been pursued.

"The desire to avoid interference with administrative regulations unless it is certain that they will not be modified to satisfy the *complainant*, (italics supplied) and the desire for expert determination insofar as possible, have led to the doctrine that the suit is premature and the issue nonjusticiable so long as the possibility of administrative relief lies unexplored."

Note, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts, 51 Harv. L. Rev. 1251, 1261 (1938).

One reason for enacting this policy was that it prevented efforts "to swamp the Courts, by a resort to them in the first instance."

United States v. Sing Tuck, 194 U.S. 161, 170 (1904).

Another reason advanced for the "exhaustion" rule is to give due play to *administrative expertness* and is based upon the ground of comity, and that the procedural administrative remedy, *if adequate*, bars resort to equity.

See Review of Administrative Acts, Uhler (1942), pp. 68-69.

Notes, Administrative Action as a Pre-requisite of Judicial Relief, 35 Col L. Rev. 230 (1935).

The inadequacy of the remedy afforded under the Act and administrative inexpertness are treated later in the brief.

The terms employed in drafting Section 204 of the Act are appropriate only to equity procedure. No terms have been used which would relate to criminal proceedings.

Here the defendants do not seek affirmative relief. They merely ask the right to defend themselves upon a criminal indictment, in a full, rather than a partial, trial. Congress could not, within the constitutional rights guaranteed to a defendant, deny him the right to a full and fair trial within the district where the crime is alleged to have been committed. He is entitled to put forth his best defense when brought to trial on an indictment. To deny him that right by legislative enactment would, in essence, deprive him of the protection afforded by the Constitution. If the construction of Section 204 (d) by the Courts below was correct, we are brought to the conclusion that our lawmakers, by the force of Section 204 (d), intended by indirection to deprive a defendant in a criminal proceeding of those rights which they, by direct legislation, could not take away from him. Such a construction should not be favored.

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a stat-

ute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), at page 36.

See also *Crowell v. Benson*, 285 U.S. 22, 62 (1931).

The fact that Congress, in a later section of the Act, Section 205 (e), conferred jurisdiction of criminal proceedings upon the District Court without any limitation upon that jurisdiction and without in any way referring to the review procedure as set out in Section 204 is strongly indicative of the fact that they were intended to be separate and distinct and Section 204 was not intended to limit the right of the District Court to hear all matters in a criminal case.

The statement of Mr. Justice Stone in *Columbia Broadcasting System, Inc., v. United States*, 316 U.S. 407 (1942) (a bill in equity to set aside an order of the Federal Communications Commission threatening irreparable injury to complainant's property), at page 425:

"The ultimate test of reviewability is not to be found in an overrefined technique"—

would seem to be applicable with even greater force to a situation such as in the instant case, where the defendant is faced not merely with injury to his property but with loss of his liberty.

D.

Cases cited and contentions of the courts below in the opinion are distinguishable.

The reason given by the Circuit Court of Appeals for its interpretation of Section 204 (d) (R. 78) is as follows:

"If a violator could procure acquittal in a criminal case by convincing the particular District Court or Jury that the Regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal and for practicable purposes the enforcement of the Regulation in that District would be at an end."

No comment is necessary upon that line of reasoning. Convenience of the Administrator cannot determine the constitutionality of the Act or the legal force of a regulation.

The opinion of the Circuit Court of Appeals (R. 81) lays down this astounding proposition:

"Appellants were indicted not for a violation of the Administrator's price regulation but for violation of Section 4 (a) of the Act. Section 4 forbids any person from selling or delivering any commodity in any course of his trade or business in violation of any regulation or order under Section 2."

The Act itself is innocuous, harmless and ineffective without the Regulation. The only power the Administrator had was to make regulations in accordance with the delegated authority. Violation of such regulations is a crime and is punishable. The crime is the violation of the Regulation issued under and in accordance with the provisions of the Act, and it cannot be presupposed that the Regulation was issued under Section 2 without making a legal determination of that fact.

United States v. Grimaud, 220 U.S. 506 (1911).
Brodhine v. Revere, 182 Mass. 599.

The Circuit Court of Appeals further said (R. 80):

"The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem [citing cases].

"It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us."

The Emergency Price Control Act combines exclusive jurisdiction to review administrative proceedings with a denial of power to stay an order, pending such review. This is an innovation in administrative procedure.

See 37 Ill. L. Rev. 256.

No case cited holds that a defendant is precluded from challenging a regulation upon which prosecution is based.

The Government generally relied on three classes of cases:

First, the license cases (sustaining licensing ordinances as a valid exercise of police power).

Second, the rate cases (sustaining regulation of rates of public utilities on the doctrine of businesses impressed with public interest).

Third, Selective Service cases (sustaining draft classifications under war powers).

1. Generally speaking, all that the licensing cases hold is that the states have a right to delegate power to issue licenses, and that such a delegation of power does not vio-

late the equal protection clause or the due process clause of the Fourteenth Amendment to the Constitution.

The licensing cases involved state rights, requiring a person to take out a license before he may conduct a business. He could still challenge the constitutionality of the Act requiring him to have a license.

Browning v. Waycross, 233 U.S. 16 (1913).

In *Bradley v. Richmond*, 227 U.S. 477 (1913), appellant had been convicted in the Hustings Court of Richmond for violating an ordinance forbidding the carrying on of the business of a private banker without a license.

In the case at bar we *did* have a license. The cases would only be analogous if the ordinance complained of in *Bradley v. Richmond* had required that, after the license was obtained, any banking business done by the licensee must be done at a loss. In that case there was no substantial loss of rights. Bradley could have continued business, and any overcharge, if the proper course was followed, would have been returned to him. Here, we would either be out of business, pending the protest, or if we continued in business on the basis of the illegal Regulation, there would be no way for recoupment of losses.

In the *Bradley* case there was no contention that the action taken by the Board was wholly outside the authority conferred upon it by statute, and after conviction was affirmed by the Supreme Court of the state, defendant started an affirmative proceeding for relief in this Court, which said at page 485:

“Under the circumstances, he is not warranted in resorting to the extraordinary jurisdiction of this Court to arrest an administrative error susceptible of correction by an appeal to the council.”

In both the *Bradley* and *Browning* cases the defendants were permitted to raise the defense in the trial Court, and the Supreme Court reviewed it.

2. The rate cases are distinguishable on other grounds. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, is an example, not of the application of the doctrine of exhaustion of administrative remedies, but of the invocation of the primary jurisdiction rule—a rule which has been confined to cases where a shipper seeks to recover damages or secure some other form of relief against some action of a carrier.

See Breck P. McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 Cal. L. Rev. 129, 144-145 (1940).

The *Lehigh Valley* and *Vacuum Oil* cases were criminal prosecutions under the Elkins Act for the giving and receiving of rebates. A rebate is there defined as any departure from the legal rate. The legal rate is established by the carrier's filing and publishing the particular rate (49 U.S.C. Sec. 41). The defendant was not permitted to defend on the ground that the rate was unreasonable. That was held to be a question only for the Interstate Commerce Commission.

Since by definition the crime charged was a departure from the *legal* rate, the legality of the rate, as distinguished from its reasonableness, was the only question to be decided by the Courts.

See Note, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 Harv. L. Rev. 1251, 1256.

The reasonableness of the rate was entirely irrelevant on the question of its legality. On the issue of legality the Court had for decision a question of fact—Had the rate been filed and published?—and that was all.

In the case at bar, however, the inquiry is of an entirely different nature: Did the defendant sell at a price in excess of the maximum price legally established? The defense, by denying the legality of the regulation under which it was issued, puts in issue the existence of a maximum price.

It must, moreover, be recognized that there is a peculiar desirability in having the Interstate Commerce Commission pass upon the question of reasonableness of rates. In so doing there are employed the services of a most expert body, which over a long period of years has completely won the confidence of the country, to pass upon the most difficult and intricate of questions—the reasonableness of a public utility rate. That, it should be recognized, is an entirely different matter from having a new, inexperienced body, hastily created as a matter of war-time expediency, passing in Washington upon thousands of local maximum prices.

3. The Selective Service cases are also far removed from the questions which confront us. The offense in those cases was failure to appear for induction; something entirely different from whether the Draft Board properly classified a defendant. In such of those cases where inquiry was excluded by the Court, the exclusion was not based upon a claim that the Draft Board action fell outside its legislative grant of authority and, therefore, was a nullity.

In some of those cases—

Rase v. United States, 129 Fed. (2d) 204 (C.C.A. 6, 1942);

Checinski v. United States, 129 Fed. (2d) 461
(C.C.A. 6, 1942);

Buttecali v. United States, 130 Fed. (2d) 172
(C.C.A. 8, 1942)—

the Court entertained the defense as to the action of the Draft Board, but found that the defense was without merit. All Selective Service cases involved judgment of the Draft Board as applied to an individual. There was no question of confiscation of rights of an entire industry, as referred to in House Report No. 898, Third Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., First Sess. (November 29, 1943), where the committee made a finding:

"It was obvious that the Regulation would ultimately result in the destruction of all nonprocessing slaughterers as a class. It was shown in the testimony before this committee as long ago as June 30, 1943, that a large number of nonprocessing slaughterers had been forced out of business because of the losses incurred through their efforts to operate under this illegal order. Dr. Gilbert said of the situation:

"The processor . . . has got a miserable shellacking for 9 months, an inexcusable shellacking.' "

Finally, still another remedy was open in those cases, which is not available to these defendants.

In *United States v. Kauten*, 133 Fed. (2d) 703 (C.C.A. 2, February 8, 1943), Judge Augustus Hand said at page 707:

"Then the writ of *habeas corpus* is sufficient to remedy any irregularity of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough

of seven days after a registrant is formally inducted before he is subjected to military training. This gives him time to apply for a writ of habeas corpus without disturbing the Selective Service machinery, if he thinks that his rights as a conscientious objector have been infringed."

In *Goff v. United States*, 135 Fed. (2d) 610 (C.C.A. 4, May 4, 1943), the Court said:

"It would seem, however, that the *total invalidity* of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order."

The Circuit Court of Appeals further said (R. 81):

"It is not amiss to note that in *Hirabayashi v. United States*, U.S. , June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhorrent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress."

In the *Hirabayashi* case, 320 U.S. 81, Mr. Chief Justice Stone said at pages 104-105:

"Under the Executive Order the basic facts, determined by the military commander in the light of knowledge then available, were whether that danger existed and whether a curfew order was an appropriate means of minimizing the danger. Since his find-

ings to that effect were, as we have said, *not without adequate support*, the legislative function was performed and the sanction of the Statute attached to violations of the curfew order." (*Italics supplied.*)

In the instant case defendants do not challenge the exercise of judgment by the Administrator that prices have risen or threaten to rise and the issuance of a proper regulation was an appropriate means of minimizing the danger; what they do say is that the Administrator failed to carry out his legislative function; that the sanction of the statute did not attach to a regulation issued outside the authority conferred upon the Administrator, and the defendants, upon trial of indictment, alleging that they violated a regulation *issued under the Act*, had the right to show that the regulation was outside the provisions of the statute, and the violation of such a regulation was not a crime.

In the *Hirabayashi* case injunctive proceedings could have been brought by Hirabayashi and judicial processes were available to prevent any wrong inflicted upon him. There was no claim that the administrative officer had failed to carry out the mandate of his authority.

In the case at bar the Act expressly excludes the right to resort to judicial process or injunctive relief, once a regulation is put into force, even though, as is here shown, the administrative officer admits that he has not confined himself to the legislative authority granted him.

III.

If Section 204 (d) does withdraw from the District Court the right to determine in criminal proceedings whether the indictment is founded upon a regulation which is illegal, arbitrary and capricious, it is unconstitutional.

A.

In conferring jurisdiction over all criminal proceedings for violations of Section 4 of the Act (Sec. 205 (c)), it becomes the obligation of the District Court to carry into effect all powers attending the exercise of its jurisdiction.

In order to sustain a conviction, under any indictment, the Government must prove all of the essential elements which go to make up the commission of a crime by a defendant. To give the Court the power to hear and determine certain of the facts and to deny it the power to hear other facts upon which the indictment is based would, in effect, strip the Court of many of the fundamental powers and duties vested in it by the Constitution and the laws.

Article III, Section 1, of the Constitution of the United States provides:

"The judicial power of the United States shall be vested in one Supreme court and in such inferior courts as the Congress, from time to time, ordain and establish."

And Article III, Section 2, states:

"The judicial power shall extend to all cases, in law and in equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; . . ."

Judicial power of the District Court, therefore, is not derived from Congress but from the Constitution. The meaning of the term "judicial power" as used in the Constitution has been defined by a number of Courts of last resort.

In *Kuhnert v. United States*, 36 Fed. Supp. 798 (1941); aff. 124 Fed. (2d) 824 (C.C.A. 8), the Court said at page 800:

"The United States District Court is one of the constitutional courts. Within the constitutional limits, the jurisdiction of district courts is determined by Congress,—in what geographical area they shall function, with respect to what *class of cases* they shall exercise *judicial power*. But the *judicial power* is conferred upon the district court *not by Congress, but by the Constitution*. To determine what is the law applicable to a case, to apply that law to the case, to render judgment accordingly, these things are of the very essence of the judicial power." (Italics supplied.)

Muskrat v. United States, 219 U.S. 346, 356.

Gilbert v. Priest, 165 Barb. (N.Y.) 444, 448.

People v. Bruner, 343 Ill. 146, 157.

State v. LeClair, 86 Me. 522.

In *Muskrat v. United States*, 219 U.S. 346 (1911), the Court said at page 356:

"It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. 'Judicial power', says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller on the Constitution, 314."

In *Gilbert v. Priest*, 165 Barb. (N.Y.) 444, the Court said at page 448:

"Judicial power within the meaning of the Constitution may be defined to be that power by which judi-

cial tribunals construe the Constitution, the laws enacted by Congress, and the treaties made with foreign powers or with Indian tribes, and determines the rights of parties in conformity with such construction."

In *People v. Bruner*, 343 Ill. 146, the Court said at page 157:

"The phrase 'judicial power' has been variously defined. Judge Cooley in his work on Constitutional Limitations, 8th ed. p. 184, defined it as the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws."

By the force of Article III of the Constitution it must be presumed that, when the District Court for the District of Massachusetts was set up, it was vested with the right to exercise the whole *judicial power* in the trial of criminal cases properly brought within its jurisdiction.

In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1935), this Court said at page 296:

"The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict."

Although Congress might vest jurisdiction over actions involving the Emergency Price Control Act and regulations thereunder, in some *constitutional* Court—

Ex Parte Bakelite Corp., 279 U.S. 438 (1929);

Williams v. United States, 289 U.S. 553 (1933)—

it cannot vest jurisdiction in the District Court and then deprive it of the right to exercise the judicial power of the Court, except in a predetermined manner. Congress cannot interfere with, restrict or limit the judicial power of that Court, as an equal and co-ordinate branch of the Government, to determine the constitutionality and validity of regulations where jurisdiction is granted and invoked for their enforcement—nor require the Court to register mechanical approval of acts of administrative or executive officers without examination of the legal merits of such acts, or compel the Courts to inflict an injury which the Constitution requires them to remedy.

Opinion of the Justices, 251 Mass. 569, 615 (1925).

United States v. Klein, 13 Wall. 128, 147 (1871).

Crowell v. Benson, 285 U.S. 22, 56-57 (1931).

As has been previously urged, there is no right or power in the Emergency Court of Appeals to determine whether the indictment is founded upon a regulation to which *jurisdiction*, as established by Section 205 of the District Court, should attach, since only the District Court may, in the first instance, determine whether a case is properly before it.

B.

The remedies provided under Sections 203 and 204 are inoperative, ineffectual and chimerical.

Under Section 203 a person affected must first file a protest with the Administrator. The protest must contain specifications of all the matters upon which the protest is based and include therewith affidavits, or other written evidence, in support of such protest.

Inadequacy of the relief afforded by the review procedure of Section 204 is immediately apparent when one considers (a) that only such data as "may be practicable" shall be included in the transcript; (b) the regulation, oppressive though it may be, is still in force, pending review; (c) the review only attaches at such time as the protest is denied; (d) the Administrator may rescind or modify the regulation, pending appeal; (e) no objection may be considered unless set forth in the protest or contained in the transcript; (f) the judgment of the Court setting aside a regulation is postponed until the expiration of thirty days from entry, and if certiorari is filed with the Supreme Court the effectiveness of such judgment is postponed until the order of the Supreme Court becomes final.

Section 203 restricts a hearing on a protest to the extent of filing affidavits, briefs or other written evidence. It permits the Administrator to accept economic data and other facts, and the judicial review is limited to a transcript of such portions of the proceeding as are material, including a statement "so far as practicable" of economic data and other facts of which the Administrator has taken official notice.

The words "so far as practicable" in Section 204 (a) limit the right of review to the convenience of the Administrator.

By indirection, a defendant in a criminal proceeding is deprived of the guaranty of the Fifth Amendment, in that at no time and in no Court may he ever have an opportunity to cross-examine the witnesses against him and be confronted by his accusers.

The Price Administrator (Statement of Considerations accompanying General Maximum Price Regulation, 7 Fed. Reg. 3153) has said:

"... in the domain of price regulation ... so much must inevitably be a matter of trial and error and adjustment ..."

It is a serious denial of rights to one faced with loss of his liberty to preclude him from showing that such a Regulation and the content thereof, formulated as an experiment, are illegal and impracticable.

Counsel for the Price Administrator, in his article, Legal Aspects of Price Control in the Defense Program (1941), 27 A.B.A.J. 527, states at page 532:

"... to the extent that all prices and price relationships are stabilized, a producer is not injured by price regulations merely because he is not able to charge a price as high as he otherwise might have charged."

The workability of the statement made by counsel for the Administrator is dependent upon the words "all" and "price relationships," and unless *proper* price relationships are established, confiscation may result.

See Comments on Notice and Opportunity to be Heard in Price Control Ceilings, 20 Texas L. Rev. 577.

There was no attempt to control the price of the livestock from which the dressed meat was processed, and with an uncontrolled economy in the basic product, in a market where there was a shortage of consumer goods, the law of supply and demand operates and the price of the uncontrolled commodity goes up. Where the control of price

started at a point beyond the basic material, the impracticability of the "experiment" established by Revised Maximum Price Regulation No. 169 becomes apparent.

The Administrator is given such wide discretion that he may fix prices on one commodity and refuse to fix them on another. In spite of the close relationship between meat and the live-stock from which it is processed, no limitation is placed upon the Administrator to act as he chooses. No right to protest non-action on the part of the Administrator is recognized by the Act, for in so doing he is merely exercising his judgment, a right given him under Section 2.

The Circuit Court of Appeals in its opinion, p. 856 (R. 77), pointed out that in *Hirabayashi v. United States*, 320 U.S. 81 (June 21, 1943), this Court said:

"The Constitution, as a continuously operating charter of Government, does not demand the impossible or the impracticable."

This interpretation of the Constitution applies in favor of the citizen with as much force as it does against him.

R.M.P.R. 169 was issued on December 10, 1942, as O.P.A. Document No. 1267 and contains about fifteen thousand words. Although Section 2 (h) of the Act provides:

"The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices, or methods or means or aids to distribution, established in any industry

..."

the Regulation proceeded to revolutionize the meat industry by eliminating terms and cuts of meat upon which the trade was founded and so recognized by custom for many years. It took time to study the Regulation and learn the

effect of these radical changes. Different rules applied in the various zones of the country and other features called for interpretations. Interpretations were in conflict even among O.P.A. officials, and confusion prevailed throughout the industry.

Meat cut in accordance with standard and accepted methods could thenceforth be sold only as a "miscut" priced at about one-third of the actual value of the meat. To illustrate: "Rumps and rounds" have been standard wholesale cuts in New England as far back as any meatman can recall. With the issuance of this Regulation, "rumps" were eliminated entirely and were made part of the loin. On the day that the Regulation went into effect, all dealers who had on hand "rumps and rounds" cut in the accepted New England manner were prohibited from selling them as such and receiving any more than approximately one-third of the price prevailing when they were cut. No specific ceiling price was established on such a cut by the Regulation.

The Circuit Court of Appeals (R. 77) recognized the difficulties attending the Administrator's economic adventure in this language:

"The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities . . . the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started."

The matters involved in a protest required a study of economics upon which the Regulation was based, also a lifetime undertaking. Economic data was needed that could not have been available to any single citizen, unless he maintained an organization of a substantial nature,

with trained personnel in the field of economics and statistical research. The complications were many and the Regulation itself was an experiment, yet the citizen was limited to a short period of sixty days to learn the effect of such a regulation and protest thereon in the manner prescribed by Section 203.

With the right to a stay, pending an appeal, denied in every Court, persons affected by a regulation adversely must either go out of business pending the review procedure or continue doing business at a loss. If the business is run at a loss pending determination of the protest, by the time it is heard and determined bankruptcy may result.

While the complaint is pending in the Emergency Court, the Administrator could rescind or revoke the regulation and replace it with a new regulation. If the new regulation were objectionable, the protest and review procedure would again have to be pursued without any relief in the interim. Revocation of the regulation before initial review is completed or pending review would render the controversy moot.

Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930).

City of Atlanta, Ga., v. Nat. Bit. Coal. Comm., 99 Fed. (2d) 348 (1938).

Where would that leave a person who was indicted after a regulation had been revoked? He could not go to the Emergency Court and ask for review, and the Courts below take the position that they have no right to pass upon a regulation under Section 204 (d).

The inadequacy of the relief afforded in the practical operation of the protest and review procedure as applied to R.M.P.R. 169 is set forth in detail in House Report No. 898, Third Intermediate Report of the Select Committee to

Investigate Executive Agencies, House of Representatives, 78th Cong. 1st Sess. (November 29, 1943), pp. 3-4:

"It was conclusively shown in the testimony before your committee on June 30, 1943, that the effect of the order was to favor, foster, and encourage monopolistic tendencies to concentrate the meat-slaughtering business in the hands of the comparatively few large processing slaughterers and to destroy the much greater number of small independent slaughterers who operate without processing facilities.

"Between January 20 and May 10, 1943, a number of protests were filed by nonprocessing slaughterers as a preliminary to their right under the statute to go to the Emergency Court of Appeals for reversal of the price-fixing order. Section 203 (a) of the statute requires the Office of Price Administration to decide the protest within 30 days or notice such protest for hearing or provide an opportunity to present further evidence in connection therewith. Instead of deciding the protest at the end of 30 days so that the victims of this order might seek their right of redress in the only court open to them, i. e., the Emergency Court of Appeals, the Administrator of the Office of Price Administration dismissed the protest with leave to amend and present further evidence. Thereafter amended protests were filed, but the Administrator took no action within the 30 days' time limit fixed by law. Thus by the use of this procedure the Office of Price Administration delayed a decision on the protests indefinitely.

"The slaughterers then filed suit in the Emergency Court of Appeals, alleging that the failure on the part of the Administrator to act upon their protest constituted in fact a denial of said protest and asked that the regulation be revoked and set aside. The Office of

Price Administration by its answer affirmatively alleged that the Emergency Court of Appeals had no jurisdiction because of the fact that the Administrator had not acted upon the protest and that there had been no denial by him of said protest. Counsel for the complainant then moved the Emergency Court for an order dismissing the defense alleged on the ground that this defense failed to constitute a claim upon which relief could be based, either in law or in fact, and on the ground that the defense was insufficient. They asked in the alternative for an order directing the Price Administrator either to grant or deny the complainant's protest, on the ground that such an order was necessary to the end that the jurisdiction of the Emergency Court be reasonably and effectively exercised. Request was also made for oral argument on this motion. On October 13, 1943, the Emergency Court of Appeals heard oral argument and at the conclusion thereof suggested that the Administrator either grant or deny the protest on or before October 27. Failing to so act voluntarily, the court indicated that it would issue an order directing the Administrator to grant or deny the protest within one week thereafter."

The indictment in this case was returned February 24, more than sixty days after the issuance of the Regulation.

Section 203 by the interpretation of the Courts below would, therefore, preclude the defendants from ever showing that their conviction was based upon an illegal regulation. Such an unreasonable limitation violates due process.

"In tax litigation an end must be promptly reached, in order that public revenues may be fixed and certain

public treasuries must not be embarrassed by deferred shrinkage of anticipated revenues."

E. Blyth Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560 (1941).

Judicial relief has been granted even in tax cases, in spite of failure to pursue all administrative remedies.

Montana National Bank v. Yellowstone County, 276 U.S. 499 (1928).

Munn v. Des Moines National Bank, 18 Fed. (2d) 269 (C.C.A. 8, 1927).

A law which indirectly imposes such conditions as would bring about denial of relief upon resort to judicial process is unconstitutional—

Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913)—

or if such irreparable injury might result, pending judicial review, as to render illusory the remedies afforded, that Act is likewise unconstitutional.

Natural Gas Pipe Line Co. v. Slattery, 302 U.S. 300 (1937).

Oklahoma Operating Co. v. Love, 252 U.S. 331 (1919).

Wadley Southern R. Co. v. Georgia, 235 U.S. 651 (1915).

Ex Parte Young, 209 U.S. 123, 146, 147, 148 (1907).

In *Smyth v. Ames*, 169 U.S. 466, 528, the Court said:

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the

courts that what it authorizes its agents to do, is consistent with the fundamental law, is an opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked; to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Gebelein Inc. v. Millbourne, 12 Fed. Supp. 105 (D.C. Md.), related to United States Revised Statutes No. 3224, which provided that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

In discussing this exclusive feature the Court said at page 118:

"But despite the generality of this provision it has been held by the Supreme Court and by other Federal Courts that its provisions are inapplicable where there exists extraordinary and entirely exceptional circumstances, the existence of which would, by applying the statute, leave the taxpayer without an adequate remedy at law. *Hill v. Wallace*, 259 U. S. 44; *Miller, Collector v. Standard Nut Margarine Co.*, 284 U. S. 498."

To require a defendant to stand trial for violation of a regulation, but deprive him of the right to show that the Administrator has not followed the authority delegated

to him by Congress, or that he has acted in such an arbitrary and capricious manner in establishing a price as to destroy an efficiently conducted industry as a whole, is a denial of due process under the Constitution.

In a criminal trial the Constitution guarantees to the accused the right to have such witnesses as are necessary to trial brought into Court to be confronted by his accusers and to be tried in the state or district where the crime is alleged to have been committed.

The Emergency Court of Appeals has its office in Washington, D.C. It sits for the most part at Washington, and at other places distant from the protesting citizen.

A defendant, in a criminal case, is left without the right to have witnesses subpoenaed in his behalf, for the Regulation, even though illegal, is accepted as the basis for a criminal act and denies to all Courts and to all defendants the right to examine such witnesses. This cannot be the due process guaranteed to a defendant in a criminal action by the Constitution, and even though we are confronted with the exigency of war, as this Court said in *Ex Parte Milligan*, 4 Wall. 2, 120-121 (1866):

"The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with a shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government."

This fundamental principle was reaffirmed by this Court in—

United States v. L. Cohen Grocery Co., 225 U.S. 81.

Ex Parte Quirin, 317 U.S. 1 (1942).

The Sixth Amendment guarantees to the defendant a full trial. The Fifth Amendment insures to a defendant the right to be tried according to law under the due process clause.

The word "trial" as used in the Sixth Amendment is defined in *Carpenter v. Winn*, 221 U.S. 533, 538-539 (1911), where the Court said:

"a. The significance of the word 'trial'. Does that word embrace anything more than is commonly understood when we speak of the 'trial' of an action at law? Or does it include, as contended here, every step in a cause between issue joined and that judicial examination and decision of the issues in an action at law, which we always refer to as the trial? Blackstone defines 'trial' to be the examination of the matters of fact in issue. 3 Bl. Com. 350. This definition is adopted by Bouvier. In *Miller v. Tobin*, 18 Fed. 609, 616, Judge Deady applied this meaning to the removal act, saying, 'Trial is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided.' But the word has often a broader significance, as referring to that final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate 'the trial'."

Trial is guaranteed according to the principles of common law.

Simons v. United States, 119 Fed. (2d) 539.

Ong Chang Wing v. United States, 218 U.S. 272 (1910).

Rogers v. Peck, 199 U.S. 425, 435 (1905).

Pertstein v. United States, 120 Fed. (2d) 276.

Callan v. Wilson, 127 U.S. 540, 549 (1888).

In *Ong Chang Wing v. United States*, 218 U.S. 272, 279, (1910), the Court said ●

"This Court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a Court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. *Rogers v. Peck*, 109 U. S. 425, 435; *Twining v. New Jersey*, 211 U. S. 78, and the cases therein cited."

In *Edwards v. United States*, 312 U.S. 473, 482 (1941), the Court said:

"The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the selection which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contention or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In *Stevens, Landowner*, 228 Mass. 368 (1917), a statute gave the right of appeal to a Court from an order of a

building inspector requiring the erection of a fire-escape. The owner on taking the appeal complained that it deprived him of his constitutional rights to a jury trial. Mr. Chief Justice Rugg said at page 373:

"Doubtless if the landowner had not sought a review by the Superior Court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector."

If a statute was enacted by Congress which was contrary to the right to make law, it would have no effect as a law. *A fortiori*, if a regulation is enacted under a law authorizing its making and the regulation as issued fails to conform to the law, it too would have no effect.

The defendants had a right to prove in their trial all of those matters essential to a full trial and have the jury pass upon them. The government does not deny that the prosecution of the defendants is based upon a regulation which itself violates the Act, and as set out in House Report, No. 862, Second Intermediate Report of the Select Committee to Investigate Executive Agencies (November 15, 1943), p. 5:

"that a citizen may be indicted, tried, and convicted for violation of an illegal regulation or order made by an executive agency, without having the right to plead such invalidity in the Court where he is indicted and tried is, indeed, a novelty in our jurisprudence and if sustained by the courts, it should be immediately corrected by amending the Act."

Conclusion.

1. While the Constitution was adopted to set up a national government, and to do for the states what the states could not do for themselves, and to define the jurisdiction and limitations of both Federal and state powers; yet the Constitution was founded for the protection of the rights of the individual citizen.

2. The Emergency Price Control Act is an unconstitutional delegation by Congress of its power and duty to enact laws under Article I of the Constitution of the United States; in fact, it is an abdication by Congress of its power to make the laws. The subject matter in Section 1 is vague and indefinite. The Administrator is given an indeterminable and almost unlimited authority to make a regulation violation of which is made a criminal offense punishable by fine and imprisonment, and this delegation goes far beyond the limitations of delegated power laid down by this Court in *Panama Refining Co. v. Ryan*, 293 U.S. 388, in which this Court said:

"The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it should be assumed that the President has acted and will act for what he believes to be the public good. The point is not one of motives but of constitutional authority for which the beliefs or motives is not substituted."

Also see the language of this Court in *Schechter v. United States*, 295 U.S. 495, at pages 537-538:

"... Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation or expansion of trade or industry."

3. The regulations made by the Price Administrator upon his own admission were an experiment based upon "trial and error." The records of discussions before congressional committees show the Administrator for the time being has admitted that the regulation did not comply with the law. Both the District Court and the Circuit Court of Appeals held that they were precluded from considering the validity, constitutional or otherwise, of any regulation by reason of the provisions of Section 204 (d) of the Act. This Court said in *Panama Refining Co. v. Ryan*, 293 U.S. 388:

"If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission."

Moreover, it should be considered that both the "Emergency Price Control Act" and the "Inflation Control Act" are a "dead letter" without regulations of the Price Administrator made under them. The regulations alone give life and effectiveness to the law. The provision of the Act contained in Section 4 (a) provides that it would be unlawful "for any person to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 . . ."

The Court, having ruled that it was precluded from considering the validity of a regulation, did not pass upon the question raised by the defendants as to whether the regulation was issued under Section 2; and jurisdiction of the Court would not attach unless the regulation was issued under that section. Defendants claim prejudicial error by the Court's refusal of their evidence in support of this contention.

4. The reasoning of the Circuit Court of Appeals in favor of the validity of the regulation is at once an admission and an apology.

"Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. It was not to be anticipated that he would glory in being 'arbitrary or capricious', or that he would be loath to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not 'generally fair and equitable.' He is at least as much interested as anybody else in the successful administration of his office" (R. 78).

This statement by the Court, comparing trained soldiers carrying out orders and employing fighting tactics to overcome those used by the enemy with the conduct of an inexperienced Administrator who, with limited authority, because of practical difficulties, undertakes to make regulations outside the limitation of his authority, is hardly analogous or persuasive of what the law should be.

5. The defendant was not in the lower Courts, and is not in this Court, seeking injunctive or affirmative relief.

If he were, it might make a difference, as indicated by the opinion of this Court in *Lockerty v. Phillips*, 319 U.S. 182, decided May 10, 1943, which left open the question as to whether the defendant might challenge the constitutionality of the Act or regulations in Courts other than the Emergency Court by way of defense to a criminal prosecution or in a civil suit.

6. Finally, the protest procedure under Section 203 of the Act and the review procedure under Section 204 of the Act are violative of the Fifth Amendment in that they do not afford due process to one charged with the commission of a crime and contravene the defendants' rights under the Sixth Amendment to the Constitution of the United States, which provides "that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Where Congress has by Section 205 (c) of the Act given the District Court jurisdiction over criminal proceedings, it cannot limit the right of the Court to determine whether the Administrator has enacted a regulation within his delegated power.

7. Petitioners do not intentionally waive points not argued for lack of sufficient time to present them, and respectfully request the Court to consider the same.

For the reasons above stated, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

LEONARD PORETSKY,

JOHN H. BACKUS,

WILLIAM H. LEWIS,

Counsel for Petitioners.

Appendix.

CONSTITUTION OF THE UNITED STATES.**Article I.**

Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

Sect. 8. The congress shall have power—to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Article III.

Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. . . .

Sect. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . .

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

AMENDMENTS TO THE CONSTITUTION.

Art. V. No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

Art. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

Art. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

EXECUTIVE ORDER 9250.*Title V—Profits and Subsidies.*

1. The Price Administrator, in fixing, reducing, or increasing prices, shall determine price ceilings in such a manner that profits are prevented which, in his judgment, are unreasonable or exorbitant.

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b); 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206; or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed \$250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection; or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

[PUBLIC LAW 729—77TH CONGRESS]

[CHAPTER 578—2D SESSION]

[H. R. 7565]

AN ACT

To amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity

was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

SEC. 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of \$5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week.

SEC. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe.

SEC. 7. (a) Section 1 (b) of the Emergency Price Control Act of 1942 is hereby amended by striking out "June 30, 1943" and substituting "June 30, 1944".

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

SEC. 8. (a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncooperators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended, shall, insofar as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war.

SEC. 9. (a) Section 4 (a) of the Act entitled "An Act to extend the life and increase the credit resources of the Commodity Credit Corporation, and for other purposes", approved July 1, 1941 (U. S. C., 1940 edition, Supp. I, title 15, sec. 713a-8), is amended—

(1) By inserting after the words "so as to support" a comma and the following: "during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares the hostilities in the present war have terminated,"

(2) By striking out "85 per centum" and inserting in lieu thereof "90 per centum"

(3) By inserting after the word "tobacco" a comma and the words "peanuts".

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4 (a), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4 (a).

SEC. 10. When used in this Act, the terms "wages" and "salaries" shall include additional compensation, on an annual or other basis paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

Approved, October 2, 1942.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 375

BENJAMIN ROTTENBERG AND B. ROTTENBERG, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT**

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 59-67) is reported in 48 F. Supp. 913. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 68-82) is not yet officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on August 23, 1943 (R. 82). The petition for a writ of certiorari was filed in this Court on Sep-

tember 22, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204 (d) of the Emergency Price Control Act of 1942 operates to prevent consideration of the validity of maximum price regulations in criminal or other suits for enforcement of the Act.

2. Whether Section 204 of the Act, in providing an exclusive procedure for review of maximum price regulations under the Act, and in prohibiting consideration of the validity of such regulations in suits to enforce the Act, contravenes the Fifth and Sixth Amendments of the Federal Constitution and works an unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

3. Whether the Act involves an unconstitutional delegation of authority to control prices.

STATUTES AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C., Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C., Appendix, Supp. II, Sec. 961 *et seq.*), and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, are contained in the Appendix. The applicable provisions will be summarized. Sections 1 (a), 2 (a), 2 (d), 2 (f), 2 (g), 2 (h), 2 (i), and 3 of the Emergency Price Control Act, and Sections 1, 2, and 3 of the October 1942 Act pertain to the issuance of maximum price regulations. Additional applicable provisions are contained in the Emergency Price Control Act. Section 4 (a) thereof makes it unlawful to violate any maximum price regulation. Section 204 provides an exclusive procedure for judicial review of maximum price regulations in the Emergency Court of Appeals, with final review by this Court. Section 204 (d) prohibits all other courts from considering the validity of the regulations in any suit, including suits for enforcement of the Act. Section 205 (b), pursuant to which these prosecutions were instituted, provides for criminal proceedings against willful violations of the prohibitions contained in Section 4 (a). Sections 302 (a) to 302 (c), inclusive, 302 (h), and 302 (i) define certain terms appearing in the price provisions of the Act. Section 303 contains a separability provision.

The applicable provisions of Revised Maximum Price Regulation No. 169 are Sections 1364.451 to 1364.455, inclusive (7 Fed. Reg. 10385-10392), establishing maximum prices for sales of wholesale cuts of beef, and Section 1364.401 (*id.* 10382),

prohibiting sales at prices above the legal maximum.

STATEMENT

Petitioners seek review of a judgment of the Circuit Court of Appeals for the First Circuit which affirmed judgments of conviction against petitioners in the District Court for the District of Massachusetts (R. 26) under indictments charging sales of wholesale cuts of beef at prices above the maximum legal prices established by Revised Maximum Price Regulation No. 169 (R. 1-13).¹ Petitioner Benjamin Rottenberg was found guilty under fourteen counts, and received a concurrent sentence of six months' imprisonment and one thousand dollars fine on each count. The corporate defendant-petitioner was found guilty under fifteen counts, and received a concurrent sentence of one thousand dollars fine on each count. (R. 27, 30.)

Petitioners filed pleas of not guilty in the District Court (R. 13-14), but offered no testimony in disproof of the violations charged. The District Court overruled a number of motions and requests for rulings raising defenses of law. Among the contentions so overruled were the fol-

¹ The indictments against the individual and corporate defendants were consolidated for trial and on the appeal below (R. 20, 68). By stipulation (R. 57-58) only the pleadings as to the individual defendant were printed in the record for the Circuit Court of Appeals, which is incorporated as part of the present Record. The pleadings as to the corporate defendant are similar to those in the present Record.

lowing: that the Regulation is invalid and that an offer of proof of such invalidity should be received (R. 16-20, 23-26, 32-37, 38-41, 42, 61-67); that Section 204 (d) of the Act (the "exclusive jurisdiction" provision) should not be construed to bar such an assertion of invalidity or an offer of proof thereof (R. 37, 50, 62-63); that Section 204 (d) is unconstitutional if construed to bar consideration of the validity of the Regulation (R. 23, 37, 38, 61-67); and that the Act makes an unconstitutional delegation of power to control prices (R. 15, 16, 18, 19, 38-39, 40, 59-60, 61).

The Circuit Court of Appeals, in affirming the convictions, held that Section 204 (d) of the Act operates to bar the attack sought to be made by petitioners against the Regulation; that Section 204 (d), as so construed, is constitutional; and that the Act does not improperly delegate legislative power to the Administrator of the Office of Price Administration. (R. 69-82).²

DISCUSSION .

The decision of the Circuit Court of Appeals, as to both the "exclusive jurisdiction"³ and the

² Petitioners have at no time attempted to obtain administrative or judicial relief in accordance with the available statutory procedures.

³ In *Henderson v. Burd*, 133 F. (2d) 515 (C. C. A. 2d, 1943); the court gave effect to the provision without discussion of its constitutionality. Compare the language of the Emergency Court of Appeals in *Davies Warehouse Co. v. Brown*, decided May 28, 1943, not yet officially reported, to be found in OPA Service 610:26, 30, pending on certiorari, No. 112, present Term.

delegation.⁴ questions, is not in conflict with the decision of any appellate court. Only a very small fraction of the large number of lower court decisions on these questions are to the contrary.⁵

⁴ The delegation of authority to control prices was upheld in *Helena Rubinstein v. Charline's Cut Rate*, 132 N. J. Eq. 254, 28 A. (2d) 113 (1942); and *Miller v. Municipal Court*, Supreme Ct., Calif., decided October 2, 1943, not yet reported. The similar delegation of authority to control rents under the Act (Sec. 2 (b)), was upheld in *Brown v. Wright*, C. C. A. 4th, decided August 11, 1943, not yet officially reported, to be found at OPA Service 622:214, and *Taylor v. Brown*, Emerg. Ct. of App., decided July 15, 1943, not yet officially reported, to be found in OPA Service 612:9.

⁵ The constitutionality of Section 204 (d) as applied in suits to enforce the Act has been upheld in *Brown v. Okla. Operating Co.*, W. D. Okla., May 28, 1943, OPA Service 620:128; *Brown v. Warner Holding Co.*, 50 F. Supp. 593 (D. Minn. 1943); *Brown v. Ayello*, 50 F. Supp. 391 (N. D. Calif. 1943); *United States v. C. Thomas Stores, Inc.*, 49 F. Supp. 111 (D. Minn. 1943); *United States v. Friedman*, 50 F. Supp. 584 (D. Conn. 1943); *United States v. Sosnowitz & Lotstein*, 50 F. Supp. 586 (D. Conn. 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *United States v. Krupnick*, D. N. J. decided October 1943, not yet reported; *Courtright v. Mohawk*, Cy. Ct. Forrest Cy., Miss., May Term 1943, OPA Service 622:157; *Regan v. Kroger Grocery & Baking Co.*, Municipal Ct., Chicago, Ill., 1943, OPA Service 620:112.

Contra: *Brown v. Wyatt Food Stores*, 49 F. Supp. 535 (N. D. Tex. 1943). In the latter case the ruling was on a motion to strike and hence the Administrator was unable to appeal. Judgment in favor of the Administrator was subsequently entered by consent.

The delegation of authority to control prices has been upheld in *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. Minn. 1943); *United States v. Hark*, 49 F. Supp. 95 (D. Mass. 1943); *United States v. Charney*, 50 F. Supp. 581 (D. Mass. 1943); *United States v. Sosnowitz & Lotstein*, 50 F.

The questions presented are, however, of exceptional public importance; those presented by Section 204 (d) of the Act are particularly so in view of their essential relation to the processes of enforcement and judicial review of the present war-time price controls. For these reasons we do not oppose the petition.

For the information of the Court we shall indicate very briefly our position on the issues raised. With respect to the question of construction of Section 204 (d), we agree with the court below that the "blanket" statutory language vesting in the statutory review forum "exclusive jurisdiction

Supp. 586 (D. Conn. 1943); *United States v. Friedman*, 50 F. Supp. 584 (D. Conn. 1943); *Brown v. Ayello*, 50 F. Supp. 391 (N. D. Cal. 1943); *United States v. Krupnick*, D. N. J., decided October 1943, not yet reported. The delegation as to control of rents has been upheld in *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Brown v. Wick*, 48 F. Supp. 887 (E. D. Mich. 1943); *Brown v. Warnex Holding Co.*, 50 F. Supp. 593 (D. Minn. 1943); *Bias v. Sankey (Brown, Intervenor)*, decided March 29, 1943, U. S. Dist. Ct., N. D. Ill., not yet reported, OPA Service 622:213; *United States v. Ehrlich*, decided April 13, 1943, U. S. Dist. Ct., S. D. Fla., not yet reported; *Brown v. Winter*, W. D. Wis., July 30, 1943, OPA Service 622:226; *Brown v. Douglass*, N. D. Tex., July 17, 1943, OPA Service 622:228; *Pratt v. Hollenbeck*, Ct. of Common Pleas, Erie Cy., Pa., April 22, 1943, OPA Service 622:109; *Home Protective Savings & Loan Ass'n v. Robinson*, Ct. of Common Pleas, Beaver Cy., Pa., May 11, 1943, OPA Service 622:122.

Contra: Roach v. Johnson, 48 F. Supp. 833 (N. D. Ind.), judgment vacated on ground of collusion, 319 U. S. 302; *Brown v. Willingham* (M. D. Ga.) (and companion cases), appeal to this Court allowed September 30, 1943.

to determine the validity of any regulation," and depriving all other courts of "jurisdiction or power to consider the validity of any such regulation," plainly comprehends a broader subject matter than a ban against suits initiated by aggrieved persons to enjoin or set aside price controls; the language cited operates to bar consideration of the validity of a particular regulation "however the litigation may originate." The court below also recognized that the legislative history confirms this construction. (R. 75-76.)

The constitutionality of Section 204 (d), as the Circuit Court of Appeals held (R. 77-80), rests primarily on the war powers of Congress. The exclusive-jurisdiction provisions, which are part of a unified statutory review plan, designed to provide protection against the rapid and pervasive effects of an unstable or nonuniform operation of inflation controls, are essential to the successful operation of this wartime statute. The statutory plan ensures continuity of control in the public interest by requiring obedience pending the permitted uniform review of the validity of regulations by a specialized tribunal. The validity of Section 204 (d) of the Act is fortified, moreover, by established principles of administrative law. Even in the absence of Section 204 (d) petitioners would probably not have had the right to challenge the Regulation below, in view of their failure to invoke the administrative remedies available to

them under the statute. E. g., *Bradley v. City of Richmond*, 227 U. S. 477; *Johnson v. United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3d, 1911); *United States v. Vacuum Oil Company*, 158 Fed. 536 (W. D. N. Y. 1908).

The delegation question, while important, was not regarded by the court below as presenting any serious difficulty. We respectfully refer the Court to the decisions on this question collected in footnotes 4 and 5, pp. 6-7, *supra*.

CONCLUSION

The decision below is correct and there is no conflict with decisions of other appellate courts. The questions presented are important; and for that reason we do not oppose the petition.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

GEORGE J. BURKE,
General Counsel,
Office of Price Administration.

OCTOBER 1943.

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on, or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

Sec. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed \$250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

Sec. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 317). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices; or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (a) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer" shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations: Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

[PUBLIC LAW 729—77TH CONGRESS]

[CHAPTER 578—2D SESSION]

[H. R. 7565]

AN ACT

To amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3, (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act; but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity

was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

SEC. 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of \$5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week.

SEC. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe.

SEC. 7. (a) Section 1 (b) of the Emergency Price Control Act of 1942 is hereby amended by striking out "June 30, 1943" and substituting "June 30, 1944".

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

SEC. 8. (a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncooperators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended, shall, insofar as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war.

SEC. 9. (a) Section 4 (a) of the Act entitled "An Act to extend the life and increase the credit resources of the Commodity Credit Corporation, and for other purposes", approved July 1, 1941 (U. S. C., 1940 edition, Supp. I, title 15, sec. 713a-8), is amended—

(1) By inserting after the words "so as to support" a comma and the following: "during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated,"

(2) By striking out "85 per centum" and inserting in lieu thereof "90 per centum".

(3) By inserting after the word "tobacco" a comma and the word "peanuts".

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4 (a), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4 (a).

SEC. 10. When used in this Act, the terms "wages" and "salaries" shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

Approved, October 2, 1942.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1943

No. 375

BENJAMIN ROTTENBERG and B. ROTTENBERG, INC.,
Petitioners,
against

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Amici Curiae.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
BENJAMIN BUSCH,
of Counsel.

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ARGUMENT

POINT I—Section 204 (d) of the Act, as construed by the Courts below, precludes courts selected by the Price Administrator as the forum for enforcement proceedings instituted by him from hearing any defenses interposed by the defendant which challenge the validity of any regulation or order issued or claimed to have been issued under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States 5

POINT II—Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the Court below, deprives the petitioners of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States 18

POINT III—Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method whereby such maximum prices shall be established, it is an unlawful delegation by Congress of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States 26

POINT IV—In view of the fact that the petitioners could not properly be indicted for a violation of M. P. R. 169, unless said regulation had been issued “under” Section 2 of the Act, and since such section under the authorities refers to one issued “in conformity with” Section 2, the Court below erred in refusing to permit evidence to be introduced upon the question whether said regulation was issued under Section 2 of the Act 37

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 375

BENJAMIN ROTTENBERG and B. ROTTENBERG, INC.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE

Preliminary Statement

The appellants, who were engaged in the sale and delivery of wholesale beef, were indicted by the United States Government, charging them with violation of Maximum Price Regulation No. 169, as amended, purportedly issued pursuant to the provisions of the Emergency Price Control Act of 1942 (56 Stat. 23).

Upon the trial of the petitioners in the United States District Court for the District of Massachusetts, the Court denied to the accused the right to introduce evidence as to the invalidity of the regulation upon which the indictment was based, and similarly refused to permit evidence to be introduced to show that the regulation was not issued *under* Section 2 of the Act, and refused to consider other evidence bearing upon the question of the validity of the regulation.

After the trial thus had, the petitioners were convicted by the jury, and the petitioner, Benjamin Rottenberg, was sentenced to pay a fine of \$1,000 and to serve a term of six months in jail, and the petitioner B. Rottenberg, Inc., was sentenced to pay a fine of \$1,000.

The judgment and sentences of the District Court were affirmed by the Circuit Court of Appeals for the First Circuit (137 F. (2d) 850).

Questions Presented On This Hearing

(1) Where enforcement proceedings are instituted by the Price Administrator under the Emergency Price Control Act and Regulations issued pursuant thereto, may the Court, which has been selected by the Price Administrator as the forum for the enforcement proceedings, properly preclude the defendants from interposing and proving every defense available to it in law and equity challenging the validity of the regulations upon which the enforcement proceedings are based?

(2) Does not Section 204 (d) of the Emergency Price Control Act of 1942, which the Government contends vests exclusive jurisdiction in the Emergency Court of Appeals to determine the validity of any regulation or order issued under Section.2:

(a) Infringe upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States?

(b) Deprive appellants in this case and other persons, that may be similarly situated in enforcement proceedings, civil and criminal, of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

(c) Deprive appellants in this case and other persons, that may be similarly situated in enforcement proceedings, civil and criminal, of a full, fair, complete and impartial trial on all issues involved, in violation of Article III, Section 2, Clause 3, of the Constitution of the United States, and in violation of the Sixth Amendment to the Constitution of the United States?

(3) Do the administrative remedies provided for by the Emergency Price Control Act of 1942 accord to persons affected thereby, due process of law, and does said Act contain adequate provisions for judicial protection and judicial review?

(4) Is the Emergency Price Control Act of 1942 unconstitutional, in that it illegally delegates legislative powers to the Price Administrator, in violation of Article I, Section 1, of the Constitution of the United States?

Summary of Argument

POINT I—Section 204 (d) of the Act, as construed by the courts below, precludes courts selected by the Price Administrator as the forum for enforcement proceedings instituted by him from hearing any defenses interposed by the defendant which challenge the validity of any regulation or order issued, or claimed to have been issued, by the Price Administrator under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

Point II—Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the court below, deprives the petitioners of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Point III—Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method, whereby such maximum prices shall be established, it is an unlawful delegation by Congress to the Administrator of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

Point IV—In view of the fact that the petitioners could not properly be indicted for a violation of M. P. R. 169, unless said regulation had been issued *under* Section 2 of the Act, and since such section, under the authorities, refers to one issued in compliance with Section 2, the Court below erred in refusing to permit evidence to be introduced to show that said regulation was not issued under Section 2 of the Act:

Point V—The contentions contained in the opinion of the court below and the authorities relied upon by the Government are distinguishable.

POINT I

Section 204.(d) of the Act, as construed by the Courts below, precludes courts selected by the Price Administrator as the forum for enforcement proceedings instituted by him from hearing any defenses interposed by the defendant which challenge the validity of any regulation or order issued, or claimed to have been issued, under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

Section 204 (d) of the Act provides as follows:

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206 and of any provision of any such regulation, order or price schedule.”

It will be noted that jurisdiction may be conferred upon the Emergency Court of Appeals only by the voluntary act of a party who must first have filed a protest with the Price Administrator (Sections 203, 204(a) of the Act).

Section 205 of the Act specifically confers jurisdiction upon the district courts in any action for enforcement brought by the Administrator.

This Court has already held in *Lockerty v. Phillips*, 319 U. S. 182, 63 Sup. Ct. 1019, that a district court does not have jurisdiction to enjoin the enforcement of price regulations prescribed by the Administrator. In

doing so, however, the Court specifically stated that it did not pass upon

"whether or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it" (p. 189).

Equally emphatic was the opinion of this Court in its statement that

"A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored" (p. 188).

The question expressly before this Court now is whether Section 204 (d) of the Act, after the submission of an enforcement proceeding to the jurisdiction of the Court, in an action brought by the administrator, does not deny all opportunity for judicial determination of an asserted constitutional right, and deny to the Court an opportunity from making "a judicial determination of an asserted constitutional right".*

Clearly, under the form of government established by our Constitution, it is within the province of the judiciary to say what the law is, and a legislative enactment may not validly shackle the inherent powers of a court and compel the rendering of an opinion based upon judicial investigation and reflection which is legislatively limited. The act of the court below in trying individuals and passing sentence under a construction of Section 204 (d) that precluded it from hearing and determining the defenses interposed by the defendants, was in violation of the first concepts of our judiciary.

* This question thus left undecided by this court in *Lockerty v. Phillips* (*supra*) has been recognized in many decisions to be one of pressing importance that should be answered. Cf. *United States v. Siegel*, 52 F. Supp. 238, *Brown v. W. T. Grant*, unreported, United States District Court, S. D. of N. Y., Dec. 14, 1943.

Early in the history of this Court, it was declared that the unrestricted power of judicial review was an essential attribute of the judicial power given to the courts by the Constitution.

In *Marbury v. Madison*, 1 Cranch. 137 (1803), Chief Justice Marshall said (at p. 177):

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

To the same effect see:

Ableman v. Booth, 21 How. 506 (1858), 520;
Gordon v. United States, 117 U. S. 697, 705.

This power flows from the Constitution itself.

Article III, Section 1, of the Constitution provides:

"The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, Clause 1, provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *."

Thus, by constitutional grant, there was created a separation of powers vesting in the judiciary an immunity from legislative control of all inherent and essential elements of judicial power.

United States v. Klein, 13 Wall. 128 (1871);
Michaelson v. United States, 266 U. S. 42 (1924).

This concept of the independence of the courts was well stated by then Professor *Felix Frankfurter* and *James M. Landis*, in an article in the *Harvard Law Review* (Vol. 37; at p. 1 (1924), in the following language:

“They (the courts) are an independent organ of government with finality of judgment within their domain, and not advisory adjuncts of the executive or the legislature.”

This conclusion flows indisputably from a long line of well settled authorities.

In *United States v. Klein*, 13 Wall. 128 (1871), there was before the court for consideration the Act of Congress which provided in substance that where in the trial of a case before the Court of Claims it was proved and established that the claimant had taken part in an act of rebellion or disloyalty, “the jurisdiction of the court shall cease” and the suit was to be dismissed. The effect of the Act is stated at greater length as follows (at p. 143):

“* * * that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of

rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed."

In holding this Act unconstitutional as an attempt by the Legislature to infringe upon the judicial power, Chief Justice *Chase* said (13 Wall. 146):

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. *The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.*

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

.

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the

court of claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." (*Italics ours.*)

That case compels analogy to the case at bar, for here, too, the Government contends the District Court "has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists", (to-wit, that a defense has been interposed of unconstitutionality or invalidity of a regulation), "its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

To follow this contention to its logical conclusion is to hold "*that Congress has inadvertently passed the limit which separates the legislative from the judicial power.*"

To the same effect is the case of *Ex Parte N. K. Fairbank Co.*, 194 Fed. 978, where the Court said (at p. 995):

"When Congress creates an inferior court and distributes to it jurisdiction over such subject-matters falling within the judicial power as Congress sees proper to confer, the particular court eo instanti is armed, by virtue of the Constitution itself, with all the power essential to preserve its independence, to prevent the usurpation of its powers by other departments, and to enable the court to exercise the judicial power thus conferred as to every matter involving a judicial determination in any case before it. While Congress may regulate the methods of practice and procedure in the court in many respects, it cannot exercise this power of regulation so as to take from the courts, under the guise of regulating its procedure, the right to exercise judicial power as to any matter arising in the case whose disposition properly calls for the exercise of judicial power."

In the case of *Kuhnert v. United States*, 36 F. Supp. 798; aff'd 127 F. (2) 824, the Court said, in reference to an Act

conferring jurisdiction upon the Federal District Court to render judgment against the United States for damage to land of named persons resulting from construction of dikes (at p. 800):

"The United States District Court is one of the constitutional courts. Within the constitutional limits, the jurisdiction of district courts is determined by Congress,—in what geographical area they shall function, with respect to what classes of cases they shall exercise judicial power. But the judicial power is conferred upon the district courts not by Congress, but by the Constitution. To determine what is the law applicable to a case, to apply that law to the case, to render judgment accordingly, these things are of the very essence of the judicial power. *It is not conceivable that Congress ever would say to the constitutional courts (such legislative courts as the Court of Claims may be in a different situation): 'Congress has decided what rule of law will govern the decision of this case; the court will pronounce judgment accordingly'.*

To illustrate, let us assume the case of A. v. United States, a war-risk insurance case. The prime questions in the case are: Was A regularly enlisted; did he apply for war risk insurance; was he totally and permanently disabled on January 1, 1925? These are questions to be decided upon the law and the evidence under and by the judicial power. Congress would not usurp the judicial power by specially legislating as to that particular case that the district court should find, as a fact that A was an enlisted man, although the evidence might be to the contrary, or that in that case the rule against hearsay evidence should not be enforced or that the district court should not apply the law applicable to the actual contract but should apply the law applicable to an entirely different character of contract. Congress would not so legislate and no judge, having respect for the judicial oath, would obey such legislation if enacted." (Italics ours.)

Yet, the contention pressed for by the Government would clothe with validity the purported mandate of Congress in the Emergency Price Control Act of 1942 which the Court

in *Kuhnert v. United States* (*supra*) held to be without the confines of constitutionality. Since a regulation issued under an act becomes an integral part of that legislative scheme, courts charged with the enforcement of the regulation would quite, logically, therefore, be constrained to enforce a regulation whose terms may be clearly unconstitutional. This must perforce follow, notwithstanding the clear indications of the decisions that judges of a State Court (which is also charged with enforcement of regulations under the Act) may not enforce a statute whose terms are clearly unconstitutional.

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60;

People v. Western Union Tel. Co., 70 Colo. 90,
198 P. 146, 15 A. L. R. 326;

Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74 (1930).

In the Matter of *Ex Parte Bakelite Corporation*, 279 U. S. 438, 49 S. C. 411 (1929), the District Courts are described as constitutional courts, not statutory. When once created by statute, they exist under the Constitution, and their jurisdiction to decide controversies brought before them cannot be whittled down. These inherent powers attach to the District Courts, so that in the matters before them they have plenary powers to decide and enforce their decision.

To this effect see: *Farrell v. Waterman Steamship Co.*, 291 Fed. 604.

It is not disputed that a District Court may be deprived by Congress of jurisdiction to entertain a controversy, but in the light of the authorities heretofore referred to, it is respectfully submitted that no equal right exists enabling the Legislature to say that once the controversy is properly before the Court, that its power to decide the controversy under all its inherent powers may be nullified or limited.

If the rule of law were otherwise, a retailer affected would be compelled to obey every regulation no matter how arbitrary, capricious, oppressive and unconstitutional it may be on its face, in order to avoid a prosecution in which he has been stripped in advance of all rights to contest the validity of the regulation.

This limitation on the power of Congress has been very adequately expressed by Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. U. S.*, 320 U. S. 118, 63 S. Ct. 1333, where he stated at page 168:

"Congress has, with limited exceptions plenary power over the jurisdiction of the federal courts. *But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority*". (Italics ours.)

The same principle is also well stated in *Michaelsen v. United States*, 291 Fed. Rep. 940 (at p. 946):

"Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution.

* * * * *

"Congress may limit the jurisdiction of an inferior court to hearing criminal cases, or to designated kinds of criminal cases; but Congress cannot constitutionally deprive the parties in such a court of the right of trial by jury. ~~The same is true of trials of 'cases in law.'~~ And the jury in such a civil or criminal court must comprise 12 jurors and their verdict must be unanimous. Similarly Congress may limit the jurisdiction of an inferior court to hearing 'cases in equity', or to designated kinds of equity cases; but Congress cannot constitutionally deprive the parties in an equity court

~~of the right of trial by the chancellor.~~ *Martin v. Hunter's Lessees*, 1 Wheat. 331, 4 L. Ed. 97; *In re Atchison* (D. C.) 284 Fed. 604."

In that case there was involved the question whether Congress had the power to deprive a court of the right to punish for contempt. The Circuit Court of Appeals in the opinion, from which the above quotation has been taken, held that the right to punish for contempt is an inherent power of the court which Congress may not abrogate.

Upon appeal this Court (266 U. S. 42, 45 S. C. 18), affirmed the view taken by the Circuit Court of Appeals, but modified it to the extent that it held that a regulation of the manner of punishment for contempt was not an abrogation thereof.

The Court pointed out that notwithstanding the control of Congress over the inferior federal courts, *it cannot adopt a statute which will render inoperative the power of those courts to function.* In that case the Court said (at p. 66):

"* * * the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

To the same effect are those cases which hold that rules of evidence, that are contrary to normal inferences, cannot be forced upon the District Court in the decision of a case properly before it.

The latest of these authorities is:

Tot v. United States, 319 U. S. 463, 63 Sp. Ct. 1241,

where it was held that the provision in the Federal Firearms Act, that possession of a firearm by a person who has been convicted of a crime of violence or who is a fugitive shall be presumptive evidence that it was re-

ceived in interstate commerce, is inconsistent with any argument drawn from experience and violates the due process clause of the Constitution.

Mr. Justice *Roberts* in his opinion stated as follows (pp. 1244, 1245):

"The rules of evidence, however, are established not alone by the courts but by the Legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. *But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.*

"This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the Legislature to create it as a rule governing the procedure of courts."

When once the Government institutes prosecution, whether civil or criminal, and thereby invokes the inherent powers of the District Court, those powers cannot in large measure be clipped off, so that the defendant is deprived of its weapons of defense. The court below, in the full exercise of its inherent powers, was clothed with constitutional protection from any interference in its right to decide all matters before it open for decision.

In the language of this Court in *Hopkins v. Southern Cal. Telephone Co.*, 275 U. S. 393, 48 S. C. Rep. 180

(at p. 399):

"As it acquired jurisdiction, all material questions were open for decision. *Greene, Auditor v. Louisville, etc., Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88."

To the same effect see *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 37 S. C. Rep. 673, where the Court stated (at p. 677):

"This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372."

Convincing proof that the Act not only has theoretically usurped powers rightfully belonging to the judiciary, but has actually resulted in many instances of such infringement, and has resulted in an administrative body which has arrogated to itself unlawful powers, is contained in the Report of the Congressional Select Committee to Investigate Executive Agencies—House Report No. 862, 78th Congress, 1st Session (November 15, 1943).

On page 6 of said Report, the following is stated:

"Nevertheless your committee has found, and proposes to show, that the Office of Price Administration has not remained within the bounds of its statutory powers. It has misinterpreted the language of the act so as to arrogate unto itself additional powers nowhere granted it by law and has administered the Act in such fashion as to cause many unnecessary hardships to our citizens."

To the same effect it is stated on pages 2 and 3 of said Report as follows:

"The committee finds that the Office of Price Administration has assumed unauthorized powers to legislate by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judicial tribunals through which this executive agency judges the actions of American citizens relative to its own regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law.

"In addition to the statutory court created by the Emergency Price Control Act, your committee has found that the Office of Price Administration has developed an unauthorized and illegal judicial system and that through the mass of rules and regulations daily enacted by that agency it has also developed such intricate and involved administrative review machinery that litigants are completely bewildered by the maze of procedure through which they must wander to eventually arrive at a court which will grant them only the crumbs of judicial relief."

These conclusions have even been confirmed by the Judiciary, as shown by the following footnote to page 5 of the Report:

"In the case of *Clarence McDugle et al. v. Alex Elson*, regional counsel, Office of Price Administration et al., decided before a three-judge Federal court in the northern division of the southern district of Illinois, September 9, 1943, Judge Briggles stated in an oral opinion that 'this is the culmination of a series, a long series, of legislative acts which tend to deprive the courts of our country of jurisdiction of many questions and many, many problems, and has vested in various boards and various agencies the decision of public questions that normally and rightfully, in my judgment, belong to the courts.' The remarks of Judge Briggles were taken in shorthand at the time they were spoken, later transcribed and a copy of his remarks is now in the files of your committee."

POINT II

Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the Court below, deprives the petitioners of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The petitioners herein were denied the right to show and prove the invalidity of the regulations under which they were indicted. Instead, it was the opinion of the courts below that due process of law was accorded to the appellants by the administrative remedies outlined by Sections 203 and 204 of the Act.

It is contended by the appellants at bar that said sections, which might have to be resorted to by one, before he may look to the courts for affirmative relief, are without application to the case at bar. It is also contended by petitioners that the doctrine of exhaustion of administrative remedies is a procedural step in equity which has to be followed before judicial processes for affirmative relief can be sought, and that said doctrine has no application to a criminal prosecution.

Aside from the suggested inapplicability of the doctrine of exhaustion of administrative remedies to a criminal case, this principle can likewise have no application to cases under the Emergency Price Control Act of 1942, because of the inadequate protection afforded by that Act to persons questioning regulations issued thereunder while the administrative remedies are sought.

We respectfully submit that administrative remedies must provide adequate protection during the time of the

consideration of the matter before the administrative tribunals, and where such protection is not afforded to the persons affected, as to those persons the statute is unconstitutional.

Thus, in examining the constitutionality of withdrawal of a limited amount of jurisdiction from the District Court to enjoin certain activities under the Labor Relations Act, this Court in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), first examined the Act as to whether adequate protection was afforded thereby. The Court stated (at p. 48):

"The grant of that exclusive power is constitutional because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board."

And concluded by saying (at p. 50):

"Since the procedure before the Board is appropriate and the judicial review so provided is *adequate*, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." (Italics ours.)

It must be observed that the court stressed the fundamental requirement of adequate protection. No such adequate protection is afforded by the act in question.

It was likewise held that statutes which deny an injunction to a public utility pending review of the fairness of a rate order are unconstitutional under the due process clause.

Mt. States Power Co. v. P. S. Commission of Montana, 299 U. S. 167 (1936);

Pacific Tel. Co. v. Kuykendall, 265 U. S. 196 (1924).

It has likewise been held that the principle of exhaustion of remedies has no application where no adequate protection is afforded to the parties questioning the regulation while an administrative remedy is sought. This is the case where an act establishes such unusually heavy penalties as to preclude judicial determination.

Ex Parte Young, 209 U. S. 123, 28 Sup. C. Rep. 441 (1908);

Natural Gas Pipeline Co. of America v. Slattery, 302 U. S. 300; 58 S. C. 199 (1937).

In the latter case, the Court stated as follows (at p. 310):

"As the act imposes penalties of from \$500 to \$2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process."

A like situation exists with respect to all persons whose business is affected by regulations issued by the Price Administrator under the Emergency Price Control Act of 1942. No bond is required of the Government while the validity of the regulation is being considered by the Price Administrator, the Emergency Court of Appeals, and the United States Supreme Court. During that time, months may elapse during which business and trade are virtually confiscated.

Moreover, the Emergency Court of Appeals, which the Government claims has exclusive jurisdiction to pass upon the validity of regulations or orders, in all events is not really a court, except in name, and can only be considered part of the administrative process established by the court. This must be clear from a study of the powers of that court. The Emergency Court of Appeals (a) has no power to enjoin the enforcement of the Act; (b) is

denied the power to issue any temporary restraining order enjoining the effectiveness of any regulation or order promulgated under the Act; and (c) any judgment of the court holding any regulation or order invalid is inoperative for a period of thirty days.

The Government has conceded that the necessity for adequate protection of the merchant is a prime requisite for the constitutionality of the Emergency Price Control Act. In 9 *Law and Contemporary Problems*, at page 76, it is stated with great assurance on the part of one of the counsel for the Government as follows:

"There is here no attempt to preclude a judicial determination by establishing unusually heavy penalties.⁷⁴ On the contrary, the path has been cleared for a speedy and complete judicial review without any of the risks of disobedience. The exclusive jurisdiction provisions require only that this path be followed. Whether or not such provisions would be appropriate in a peace-time price control measure, with no real threat of inflation impending, is now an academic question. There is no doubt that the exclusive jurisdiction provisions are both appropriate and essential to the effective operation of the Emergency Price Control Act."

⁷⁴Cf. *Ex parte Young*, 209 U. S. 123 (1908).

A very clear example as to what must await the merchant who would perchance test the validity of a regulation along the devious administrative routes outlined by the Act, appears in connection with another regulation issued under the Act, to-wit, Maximum Price Regulation No. 330 (referred to here as M. P. R. 330).

M. P. R. 330, was issued on February 18, 1943. Said Regulation is upon its face not one for price control but for sales limitation. Within sixty days thereafter, to-wit, on April 19, 1943, *Montgomery Ward & Co., Inc.*, filed its protest with the Secretary of the Office of Price Administration. This protest claimed that M. P. R. 330 was in-

valid because in excess of the statutory power of the Price Administrator. On May 20, 1943, the Office of Price Administration issued an order denying the said protest. A complaint was thereafter duly filed on June 19, 1943, with the United States Emergency Court of Appeals, and on September 23, 1943, the matter came up for hearing before the United States Emergency Court of Appeals.

*While the decision from that Court was still pending, the Price Administrator commenced injunction proceedings to enjoin Montgomery Ward & Co., Inc., from alleged violation of M. P. R. 330, the very Regulation which is before the Emergency Court of Appeals on the protest and complaint of said Montgomery Ward & Co. Inc. The injunction proceeding has already been determined, and an injunction has issued against Montgomery Ward & Co., Inc., notwithstanding the fact that at that time no decision had been handed down by the Emergency Court of Appeals.**

The very thing which this Court in *Natural Gas Pipeline Co. of America v. Slaterry* (*supra*), said was not within the realm of due process, has been forced upon Montgomery Ward & Co., Inc., under the Price Administrator's construction of the Emergency Price Control Act, to-wit, that company is now suffering from the penalties and hardships of an injunction "pending an attempt to test the validity of the order in the courts and for a reasonable time after decision", and this situation is in the language of the same Court "a denial of due process".**

The denial to merchants in all cases affected by the Act and the Regulations issued thereunder of the right of a stay, pending completion of the lengthy administrative process just outlined, establishes the inapplicability of the doctrine of the exhaustion of administrative remedies.

* Case still unreported.

** That this is by no means an isolated instance, appears from the cases of *Safeway Stores, Inc. v. Brown*, Emergency Court of Appeals, 1 Price Control Cases, Par. 50,589, Cert. denied, Dec. 13, 1943, 12 LW 3198 and *Aberle, Inc. et al v. Prentiss Brown*, Emergency Court of Appeals, Docket No. 97, undecided.

In *Porter v. Investors Syndicate*, 286 U. S. 461 (1932), this Court, in an opinion by Mr. Justice *Roberts*, said (at pp. 470, 471):

“Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall*, 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.”

See also:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 (1923).

It is a fact that the Legislature in enacting Statutes providing for administrative regulation has in the past been cognizant of the requirement that provision be made for the stay of administrative orders that are likely to bring about harsh results if left outstanding pending judicial review thereof.

Provisions for that purpose appear in the (1) Securities Act of 1933, (2) Securities Act of 1934, (3) Public Utility Holding Company Act of 1935, (4) the Federal Power Act, (5) the National Labor Relations Act, (6) the Natural Gas Act, (7) the Fair Labor Standards Act of 1938, (8) the National Bituminous Coal Commission Act, (9) the Agricultural Adjustment Act of 1938, (10) the Civil

Aeronautics Act of 1938, and (11) the Federal Food, Drug and Cosmetics Act of 1938. (12) Under the Federal Alcohol Administration Act, the commencement of review proceedings operates as a stay unless the court orders to the contrary.

Judicial sanction has been given to stays pending review of administrative action, where irreparable loss and damages may result, in the following cases:

Uebersee Finanz-Korporation, etc. v. Rosen, 83 F. (2d) 225, 228;

Truax-Traer Coal Co. v. National Bituminous Coal Commission, 95 F. (2d) 218;

Saxon Coal Mining Co. v. National Bituminous Coal Commission, 96 F. (2d) 517.

— In the last mentioned case, the United States Court of Appeals for the District of Columbia in its opinion stated as follows (at p. 517):

“ * * * it further appears that the producing coal companies were parties to these orders and that they are interested parties, and that if the orders are invalid, they are suffering irreparable and continuing damage. Under these circumstances the denial of relief pendente lite, sought to prevent continuing irreparable damage and to preserve in so far as possible the status quo until a ruling upon final review, would be extraordinary unless the ultimate right of review sought is clearly without foundation.”

Of particular interest with regard to these contentions is the 43rd Report of the Special Committee on Administrative Law of the American Bar Association, wherein the following is stated on page 3 thereof:

“If Congress has provided a statutory scheme for such review, he may find that too but an illusion. Take the Emergency Price Control Act of 1942. If

the citizen were charged with an ordinary criminal offense, under the Bill of Rights he would 'enjoy the right to a speedy and public trial, by an impartial jury of the state and district.' But if charged with criminal violation of the Price Control Act, or prosecuted civilly, he may have the benefit of constitutional and statutory protections and defenses only in the Emergency Court of Appeals at Washington (Section 204 (d), Emergency Price Control act). Even then he must first have undertaken formal protest proceedings before the Price Control Administrator, which may consume three months (Section 203 (a)). Then he must take some time, say a month, to get the case into the Emergency Court staffed by specially assigned judges busy in their several circuits. *Meanwhile that court has no authority to grant him a stay of the price regulation (Section 204 (c)), something that Congress has never before withheld (Scripps-Howard Radio v. Comm'n., 316 U. S. 4, 17).* Even should that court find for him, its judgment is suspended for at least a month, and for an indefinite time if the Government shall seek *certiorari* in the Supreme Court (Section 204 (b)). At the very least six months will have elapsed, after which the issues will long since have become moot or the Office of Price Administration may make some insufficient adjustment and so require the parties to start all over again. Not only is the statutory review illusory, but it effectively precludes recourse to non-statutory review which might otherwise be available. The consequent lack of any practical review leaves the statute merely advisory and the administrative arm supreme. And there is no reason to believe that this state of affairs has not harmed, rather than aided, the cause of price control." (Italics ours.)

It is respectfully submitted that the contentions contained under this Point are especially warranted in the light of the following conclusion contained in the Report of the Select Committee To Investigate Executive Agencies, House Re-

port No. 862, 78th Congr., 1st Session, wherein it is stated as follows (at p. 8):

"With the narrow limitations, both on the scope of review and the extent of relief which the court may grant, your committee submits that it will be very rare when the Court will be able to determine that any decision of the Administrator is 'arbitrary or capricious' and that therefore the scope of the judicial review provided as a safeguard in the act is so small as to be almost nonexistent." (Italics ours.)

In view of the unreasonable length of time that must elapse before administrative review is possible, no argument is required to show that during such proceedings, a merchant may suffer irreparable loss and damages. Under the cases discussed herein, the inadequacy of judicial review constitutes deprivation of property without due process of law, in violation of the Fifth Amendment to the Constitution.

POINT III

Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method whereby such maximum prices shall be established, it is an unlawful delegation by Congress of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

It is a fundamental constitutional principle that the power of the Congress to legislate is confined constitutionally to the Congress, and the delegation of such powers may validly be made only under carefully defined standards and rules.

As stated by this Court in:

Wichita R. & L. Co. v. Commission (1922), 260
U. S. 48, 43 S. Ct. 51,

(at p. 59):

"In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

The motive of Congress in effecting the delegation is not the basis for testing the constitutionality of the Act.

In: *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. Rep. 241 (1935), there came before this Court the validity of an Executive Order issued pursuant to a provision of the National Industrial Recovery Act of June, 1933, which authorized the President to prohibit transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, and further provided that any violation of any order of the President issued thereunder should be punishable by fine or imprisonment, or both. The President under an Executive Order prohibited the transportation in interstate and foreign commerce of petroleum in excess of the amount permitted by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Referring thereto, this Court, per Mr. Chief Justice *Hughes*, said as follows (at p. 420):

"The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it should be assumed that the President has acted and will act for what he believes to be the public good. The point is not one of motives but of constitutional authority for which the best of motives is not a substitute."

In the same case, this Court in invalidating the Executive Order, based its decision upon the fact that in effecting its delegation of power (at p. 430):

“* * * Congress has declared no policy, has established no standard, has laid down no rule, * * *.”

This Court has thus expressly held that a policy and standards must be set up to give an act of Congress constitutionality. The Emergency Price Control Act of 1942 in its delegation of powers to the Price Administrator is as defective as was the act and order under consideration in *Panama Refining Co. v. Ryan* (*supra*).

As stated in *Roach v. Johnson*, 48 F. Supp. 833, in discussing the Emergency Price Control Act of 1942 (at p. 834):

“The order in this case, as in the *Panama* case, contains no finding of facts, no statement of the grounds of the Administrator's action. Again in the case at bar, as was held in the *Panama* case, if it could be inferred that Congress intended certain circumstances or conditions to govern the exercise of the authority conferred, the Administrator could not act validly without complying with the circumstances and conditions and findings by the Administrator that these conditions existed and were necessary, else it is left entirely to the unfettered discretion of the Administrator.”

“No determinations of facts are shown in the case at bar. The only provision in the Emergency Price Control Act that even hints at the necessity for determination of fact is found in Section 202, 50 U. S. C. A. Appendix § 922, where it is provided that:

“The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the Administration and enforcement of this Act and regulations, orders, and price schedules thereunder’.”

(At pp. 834, 835):

"As defendant very well says on page 16 of his brief,

'He (the Administrator) possesses here not only a figurative "roving commission", but one in patent literalness. He may move from state to state, from county to county, and according as "the spirit moves" or in the measure of his last nocturnal sojourn, whether restful or restless, his morning meal palatable or inedible, find or decline to find, as for that territorial locality where each morning sun discovered him, that it was "an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations which will bring about speculative, unwarranted and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war". He (the Administrator) *becomes the general agent of the Congress—first to choose the area for legislation, then to choose the character of the legislation that he believes suits the area selected for action, and there to enforce it in the manner he sees fit.*' " (Italics ours.)

A judgment was entered in the above case based upon a finding of the invalidity of the Emergency Price Control Act.

The judgment was vacated by this Court (May 24, 1943), on the ground that the judgment had been obtained by collusion between the plaintiff (tenant) and the defendant (landlord), but no contrary opinion was expressed.

Schechter Corp. v. United States, 295 U. S: 495 (1935), involved the validity of Section 3 (a) of the National Industrial Recovery Act, authorizing the President to approve codes of fair competition "for trades and industries". The Statute provided that codes may be approved upon application of one or more trades or industrial groups, if the President found (1) that such associations impose no equitable restrictions on membership, and are

representative, and (2) that the codes are not designed to promote, monopolize or to eliminate small industries or to discriminate against them. It further provided that the President may as a condition of approval of any code, impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interests, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

In holding that such a sweeping delegation of legislative power found no support in the decisions of this Court, it said (295 U. S. 541):

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

As stated in the concurring language of Mr. Justice Cardozo (at p. 551):

"This court has held that delegation may be unlawful, though the act to be performed is definite and single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate."

Applying the principle of these cases to the present case, the conclusion is clear that the Emergency Price Control Act should be declared unconstitutional as an improper delegation by Congress of its legislative functions. By this Act Congress has conferred upon the Administrator not merely the power to fill up the details in the general scheme of the Act, or to exercise the administrative function of applying a general principle or standard, but complete and comprehensive authority to determine what the Act shall include, when it shall begin to operate, and when price schedules, regulations, or orders shall terminate.

The general purposes of the Act are stated in Section 1 (a) as follows:

"It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

In order to carry out the stated purposes of the Act, Congress has delegated to the Administrator in Section 2 (a) virtually complete discretion in the matter of fixing maximum prices. Section 2 (a) provides:

"Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise, and consult with representative members of the industry which will be affected by such regulation or order. * * * Whenever in the judgment of the Administrator such action is necessary or proper in

order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders, establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2 (c) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

By Section 2 (h) of the Act it is further provided that the powers granted by Section 2 shall not "be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry".

It will thus be seen that under the provisions of this Act the power to determine on what commodities price ceilings should be placed is wholly discretionary and not mandatory. Although Section 2 (a) uses the word "shall" when dealing with the ascertainment and consideration of prices prevailing on any date and for the making of adjustments, it, nevertheless, provides that in establishing any maximum

price the Administrator shall do so only so far as practicable. Whatever mandatory effect these words may have is completely emasculated by Section 2 (c) which, it should be observed, provides that any regulation may be established in such form and manner, contain such classifications and differentiations, and provide for such adjustments and exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This latter provision, when considered with the words "so far as practicable", clearly shows that the Administrator is not compelled to follow any specified or certain standard but may fix any price which he may choose without taking into consideration any of the elements specified in Section 2 (a). Thereby no mandatory standard is established by the Act.

Moreover, there is no requirement in the Act that the Administrator must fix a price ceiling on every commodity which rises or threatens to rise. He may fix ceilings on some commodities and leave others alone. He may, under the terms of the Act, even differentiate between commodities in the same class. Thus, he may fix a ceiling on the price of chickens but need not on ducks or geese. In addition, he may terminate any price schedule whenever he wishes and re-impose any kind of a ceiling whenever he chooses. This gives him such an unbounded discretion, in the words of Justice *Cardozo*, as to amount to "delegation running riot."

Thus, the Administrator has not only been given the power to determine what prices should be fixed and what commodities should be covered by the price ceilings, but also the power to determine when a price ceiling shall begin and when it shall terminate. Congress has thereby failed to define the circumstances and conditions under which the Administrator should act and in the same manner Congress has failed to set up any standard sufficiently definite to guide him in his determination as to the period for which each price ceiling should exist.

Nor is the Administrator obliged to depend upon any specified procedure for the determination of the circumstances and conditions under which the ceiling is to be imposed or discontinued. Even fixing of the price ceiling is left to the uncontrolled discretion of the Administrator. Although Section 2 (a) provides that consideration should be given to the prices prevailing between October 1 and October 15, 1941 and that he shall make adjustments for such relevant factors as he might determine and deem to be of general applicability, such as speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of commodities during and subsequent to the year ended October 1, 1941, as we have already pointed out, he is not compelled to act upon such facts. All he is required to do is to consider them. So long as he considers them, he may disregard them completely. Again, this is not sufficient to provide a certain or definite standard for the setting of a price ceiling.

Nor can it be reasonably argued that the exercise of the powers conferred by the Act is merely a ministerial function delegated to the Administrator. If he may set a ceiling or unmake it, if he may apply it to all or none of the commodities sold in this country, if he may extend it to competing commodities or restrict it to enumerated commodities, if he may begin and end its application and determine its duration, if he may fix the extent of the ceiling, then and under such conditions the powers exercised by him cannot be said to be merely administrative but are, without question, discretionary. As such they clearly violate the constitutional prohibition against the delegation of powers for by their exercise it is the Administrator and not Congress who performs the legislative function. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Corp. v. United States*, 295 U. S. 495 (1935).

Thus under M. P. R. 330, Section 1389.562 (a), the Administrator undertakes to set out definitions to govern

the regulations and in doing so, undertakes to subordinate the definitions contained in the Act itself, and to make the definitions contained in the Act applicable only where he has not otherwise specifically provided, for Section 1389.562 (a) provides:

"Unless the context otherwise requires or unless *otherwise* specifically provided herein, the definitions set forth in Section 302 of the Emergency Price Control Act of 1942, as Amended, and in § 1499.20 of the General Maximum Price Regulation, shall apply to the terms used in this regulation." (Italics ours.)

In other words, Section 302 of the Act, which has certain definitions, means nothing to the Administrator.

302 (i) of the Act defines maximum price as the maximum *lawful* price of a "commodity", which word is defined in Sec. 302 (c) of the Act, yet the administrator subordinates this definition and says to merchants under M. P. R. 330:

"You who were in business in March 1942 may not sell any merchandise above the highest price line carried by you during that month, notwithstanding that under the statement of considerations for Regulation 330 I have given your present competitors, who happened not to be in business in March 1942 the right to sell the same garment at the highest price charged by his most closely competitive seller, without reference to the March 1942 highest price line."

Assuming therefore (and it happens to be the fact) that a merchant was selling coats in March 1942 and the highest priced coat sold by him during that month was \$14.89. This merchant has a coat of better quality which he can sell for \$16.89, the Administrator forbids him to do so, notwithstanding the fact that that same coat is being sold by a competitor for \$19.98. Thus the Administrator has one maximum lawful price for the merchant in business in March 1942, who operated at low cost and low markup and a much higher maximum lawful price for the mer-

chant who operated at high cost with high markups in March 1942, and a high maximum lawful price for the man who was not in business in March 1942, all of whom sell the identical article. That illustrates the construction by the Administration of Section 302(i) and Section 302(e) of the Act, and shows that the Administrator is absolutely indifferent to the meaning of maximum lawful price as set out in the Act. In other words, as he states in 1389.562(a) the statutory definitions have no worth or value when they conflict with the definition that the Administrator wishes to give to his Regulations.

It is submitted under this point that the Emergency Price Control Act of 1942 as amended by the Inflation Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator,

POINT IV

In view of the fact that the petitioners could not properly be indicted for a violation of M. P. R. 169, unless said regulation had been issued "*under*" Section 2 of the Act, and since such section under the authorities refers to one issued "*in conformity with*" Section 2, the Court below erred in refusing to permit evidence to be introduced upon the question whether said regulation was issued under Section 2 of the Act.

The legality of the acts of the petitioners must be based upon the provisions of Section 4 (a) of the Emergency Price Control Act of 1942, which states as follows:

"It shall be unlawful * * * to do or omit to do any act, in violation of any regulation or order *under* section 2, * * *." (Italics ours.)

Clearly, therefore, unless M. P. R. 169 was issued "*under*" Section 2 of the Act, there has been no unlawful act of petitioners. That question can be determined

only upon inquiry as to whether the regulation in question was issued "in compliance" with the law authorizing its issuance.

We respectfully refer to the authorities establishing that the word "under" must be judicially defined as meaning "in conformity with".

To this effect, see *Risley v. Village of Howell*, 64 Fed. 453, in which case the Circuit Court of Appeals, referring to the question whether Municipal Bonds were properly issued under a statute, said as follows (at pp. 456-457):

"In order to determine what effect should be given to this part of the recitals in the bonds, reference must be and to the whole instrument under the just and familiar rule of construction. In one part of each of the bonds it was represented that it was an 'improvement bond'. This, taken in connection with the subsequent reference to the statute, meant that it was a bond issued to provide means for a public improvement. In another place it was represented that the bond was 'issued under and by authority of a special act of the state of Michigan entitled, "An act to authorize the village of Howell to make public improvements in the village of Howell," being Act 248 of the Local Acts of 1885 of the legislature of the state of Michigan, approved February 25, 1885, and also under the ordinance of the village of Howell, passed August 12, 1885.' What was the meaning of this representation? To say that a thing is done 'under and by the authority' of a statute referred to is equivalent to saying that it is done in conformity with it, and authorized by it. In *Stoddard v. Chambers*, 2 How. 284, 317, the supreme court said, in speaking of a statute which excluded from its operation locations of land previously made 'under any law of the United States': 'Now, an act under a law means in conformity with it, and unless the location of the defendant shall have been made agreeably to law' he is not within the exception." (Italics ours.)

And also:

City of Defiance v. Schmidt, 123 Fed. 1, 7.

Proof of the necessary compliance with the Act was even necessary to sustain the opinion of the Court below that the Emergency Court has exclusive jurisdiction herein, because of the language of Section 204 (d) of the Act which states as follows:

"Except as provided in this Section, no court, federal, state or territorial, shall have jurisdiction or power to consider the validity of any such regulation
"

"Such regulation" refers to the former part of Section 204 (d) which states that the Emergency Court shall have exclusive jurisdiction to determine the validity of any regulation or order issued *under* Section 2.

It is worthy of observation that said Section 2 contains substantive limitations upon, and conditions precedent to, the valid and proper acts of the Administrator. Therefore, if the Administrator has promulgated a regulation which does not satisfy a condition precedent set forth as a substantive limitation upon his acts, said regulation has had no proper genesis and is a nullity. How, therefore, can it be properly contended that the district court below was correct in refusing to pass upon whether the regulation here in question was issued under Section 2 of the Act? Or in refusing to receive evidence to show that it was not?

If the regulation, which was the basis of the indictment was not validly in existence at the time of the acts complained of, no crime was committed.

In the language of the Court in *United States of America v. Pepper Bros.* (U. S. District Court for the District of Delaware; Opinion Unreported):

"The finding in favor of defendant does not poach on the preserves of the Emergency Court of Appeals because I am not passing on the *validity* of any regulation promulgated under the Act. The word 'validity' is to be given its ordinary dictionary meaning since there is no persuasive evidence that Congress used it

in a different or unusual sense when it enacted Sec. 204 (d) of the Act. *Boston Sand Co. v. United States*, 278 U. S. 41, 48. I simply find there was no regulatory mandate in existence at the time of defendant's acts complained of, the violation of which, it is charged, constitutes a crime."

The Trial Court, therefore, erred in refusing to permit the indicted parties to introduce evidence upon the question of whether the regulation was issued *under* Section 2 of the Act.

POINT V

The contentions contained in the opinion of the Court below and the authorities relied upon by the Government are distinguishable.

Construction of the Act before the Court involves a question of most serious import. By said Act, Congress, although vesting jurisdiction in the District Court for the enforcement of violations of regulations issued under the Act, has at the same time sought to withhold from that Court the right to hear in the same action such defenses, including asserted constitutional rights interposed by the defendant, which question the validity of a regulation.

This Court has already held that, a construction of a statute, which would deny all opportunity for a judicial determination of an asserted constitutional right, is not to be favored. (*Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019.)

The reasoning of the court below in its opinion in the instant case passing upon this question smacks of sophistry. There, the opinion of the Court states as follows (R. 81):

"But the answer is, that Congress has not taken from the district courts the judicial power to decide

any question of relevancy of proffered evidence. The District Court exercised such power in these very cases. It ruled that the Emergency Price Control Act was a valid enactment, and that under the provisions of the act the proffered evidence was not relevant. Appellants were indicted, not for a violation of the Administrator's price regulation, but for a violation of § 4 (a) of the Act."

There can be no violation of Section 4 (a) of the Act unless there is a violation of a regulation issued by the Administrator under the Act, and it was just that refusal of the District Court to accept the proffered evidence as to the invalidity of the regulation which spells for the petitioners in this case the difference between the freedom of obtaining the judicial review of an asserted constitutional right and criminal sentence and fine, with the constitutional rights undetermined, but instead relegated to an inadequate and impractical administrative forum.

The cases cited by the court below and other cases, that may be relied upon by the Government, to the effect that Congress may limit or withhold jurisdiction from inferior courts, are quite beside the point. There is no dispute of the right of Congress to do so.

If Congress had stated in the Emergency Price Control Act that only the Emergency Court of Appeals had jurisdiction to hear and determine every question involving the Emergency Price Control Act, including enforcement thereof, except the Supreme Court upon review, then there could be no question but that jurisdiction with regard to the Act had properly been withheld from the Court.

But this Congress did not do. Instead the Act states that District Courts and State Courts shall have jurisdiction in enforcement suits, and that, of course, means to hear and *determine* enforcement suits. But these courts, thus clothed with jurisdiction, find their inherent powers suddenly stripped at a point where the defendant inter-

poses defenses and proffers evidence on the question of the invalidity of the regulation which is the very basis for the enforcement suit. *Therein lies an excess of power not sanctioned by the Constitution of the United States.*

This Court in *Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019, while it expressed the undisputed principle that Congress has plenary power over the jurisdiction of the federal courts, did not hold that jurisdiction, once conferred, could at the same time be nullified or limited. On the contrary, Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. U. S.*, 320 U. S. 118, 63 S. Ct. 1333, at page 168, did hold that it was not within the authority of Congress to confer jurisdiction upon federal courts and at the same time nullify the effect of the exercise thereof by such courts.

The court below refers not at all to the adequacy of administrative review contained in the Act. The Government may rely upon the following cases:

- Texas & Pac. Ry. Co. v. Abilene Cotton Co.*, 204 U. S. 426; 27 S. C. 350 (1907);
- Lehigh Valley RR. Co. v. U. S.*, 188 F. Rep. 879;
- U. S. v. Vacuum Oil Co.*, 158 F. Rep. 536.

These cases are all distinguishable. They involve suits in which a schedule of rates was established by the Interstate Commerce Commission, the Court holding that the shipper or the railroad company could not raise the question of the invalidity of the rates without having exhausted the administrative remedy. But in those cases the persons affected by the rates had an adequate remedy if the rates were confiscatory after having exhausted the administrative remedy and having been denied the same, since where the courts held the rates confiscatory, they were in a position to recover the excess paid. No such

situation exists in the case before this Court. On the contrary, injunctions may be obtained against businessmen, as in the case of *Montgomery Ward & Co.* (pp. 21, 22 of this brief), and no bond need be given by the Price Administrator. So that if upon review the Court should vacate the injunction, the merchant has suffered loss of months of time and consequent loss of money, if not his entire business, without hope of compensation.

In the twelve statutes referred to on pages 23 and 24 of this brief, provision is contained for stays pending review of administrative action, where irreparable loss and damages may result. No such right is given under the Act in question.

Reliance may also be placed by the Government upon *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, wherein the doctrine of the exhaustion of administrative remedy was approved. However, as already pointed out, the decision in that case is founded upon the provisions in the Act granting (at p. 48) "adequate opportunity to secure judicial protection against possible illegal action on the part of the board".

It is also worthy of note that the opposition to the issuance of the injunction therein was wholly placed upon the grounds that litigation would result in an expense and annoyance, the exact language being as follows:

"* * * that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the corporation and its employees, and thus seriously impair the efficiency of its operations."

The decision of this Court in that case in effect held

"that the expense and annoyance of litigation is 'part of the social burden of living under government.'"

(*Petroleum Exploration v. Public Service Com'n.*,
304 U. S. 200, 222; 58 S. C. 834, 841.)

The situation in the case at bar is radically different. Here is involved no mere cost of litigation or impairment of good will and harmonious relations. Here is involved the freedom from taint of criminality of men and their commercial enterprises.

The question of delegation of power was but briefly touched upon by the court below and without discussion. Perhaps all that was said in defense of the Government's position as to the question of delegation of powers was stated in the brief submitted by General Counsel to the Office of Price Administration in the hearings before the Senate Committee on Banking and Currency.

On page 229 of the Committee Report (Dec. 1941), counsel holds that the standards in the Act are fully definite, and as proof thereof states the following (at p. 229):

"Not only must the maximum prices established be fair and equitable and in accord with the purposes of the act but they also must be established, so far as practicable, with due consideration for prices prevailing during a specified period of time before the legislation became effective."

This standard approved by the Government as being fully definite must give pause to men in free governments. For here the standard is not what Congress thinks would be fair and equitable under designated facts, but what the Administrator in his uncontrolled discretion thinks would be fair and equitable. The Administrator thus becomes

the general agent of Congress, first to decide upon what commodities maximum prices must be established, then to decide himself as to what is fair and equitable and what is practicable, and then to choose the character of the regulation to put his thoughts into force, and next to enforce it in any manner he sees fit.

In the language of Mr. Justice *Cardozo* in *Schechter v. United States*, 295 U. S. 495, 551:

“The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, * * *”

It “is delegation running riot” (at p. 553).

CONCLUSION

The judgment of the Lower Court should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 374, 375.—OCTOBER TERM, 1943.

374 Albert Yakus, Petitioner,
 vs.
The United States of America.

Benjamin Rottenberg and B. Rot-
tenberg, Inc., Petitioners,

375 vs.
The United States of America.

On Writs of Certiorari to
the United States Circuit
Court of Appeals for the
First Circuit.

[March 27, 1944.]

Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, §§ 901 *et seq.*, as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, §§ 961 *et seq.*, involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether § 204(d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by §§ 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, § 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of §§ 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of beef at prices above the maxi-

imum prices prescribed by §§ 1364.451-1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed. Reg. 10381 *et seq.* Petitioners have not availed themselves of the procedure set up by §§ 203 and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see *Lockerty v. Phillips*, 319 U. S. 182. When the indictments were found the 60 days period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in *Lockerty v. Phillips, supra*, whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F. 2d 850, and we granted certiorari, 320 U. S. 730.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in § 1(b) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war", and that its purposes are:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; . . ."

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by § 2(a) and by § 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, promulgated under it. 7 Fed. Reg. 7871. By § 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

The section also directs that

"So far as practicable, in establishing any maximum price the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the com-

modity or commodities, during and subsequent to the year ended October 1, 1941."

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, § 4 of Executive Order No. 9250, he has directed "all departments and agencies of the Government" "to stabilize the cost of living in accordance with the Act of October 2, 1942."¹

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum prices for the sale at wholesale of specified cuts of beef and veal. As is required by § 2(a) of the Act, it was accompanied by a "statement of the considerations involved" in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,² and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was

¹ The parties have not discussed in briefs or on argument, and we do not find it necessary to consider, the precise effect of this direction to stabilize prices "so far as practicable" at the levels obtaining on September 15, 1942, upon the standards laid down by Section 2(a) of the Act and the discretion which they confer on the Administrator.

² The use of the March 16-28, 1942, base period is explained by the fact that wholesale meat prices had already been stabilized at approximately that level by Maximum Price Regulation No. 169 as originally issued on June 19, 1942, 7 Fed. Reg. 4653; and by the General Maximum Price Regulation, issued April 28, 1942, 7 Fed. Reg. 3153, which forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March, 1942. The Statement of Considerations accompanying the latter, 2 C. C. H. War Law Service—Price Control, ¶ 42,081, explains in some detail the considerations impelling the Administrator to the conclusion that stabilization at the levels obtaining in March, 1942 would be fair and equitable and would effectuate the purposes of the Act; it considers the price levels prevailing during October 1-15, 1941, and gives reasons why price stabilization at those levels would not be practicable. The Statement of Considerations accompanying Maximum Price Regulation No. 169 as originally issued, 2 C. C. H. War Law Service—Price Control, ¶ 43,369A, refers to this discussion in explanation of the continuance of the use of March, 1942, levels as a base.

adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare *Field v. Clark*, 143 U. S. 649; *Hampton & Co. v. United States*, 276 U. S. 394; *Curran v. Wallace*, 306 U. S. 1; *Mulford v. Smith*, 307 U. S. 38; *United States v. Rock Royal Co-operative*, 307 U. S. 533; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Opp Cotton Mills v. Administrator*, 312 U. S. 126; *National Broadcasting Co. v. United States*, 319 U. S. 190; *Hirabayashi v. United States*, 320 U. S. 81.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in *Schechter Corp. v. United*

States, 295 U. S. 495, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare *Sunshine Coal Co. v. Adkins*, *supra*, 399.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See *Opp Cotton Mills v. Administrator*, *supra*, 145-6, and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of

courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Curriu v. Wallace*, *supra*, 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Company v. United States*, 204 U. S. 364, 386. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *M'Culloch v. Maryland*, 4 Wheat. 316, 413 *et seq.* It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton v. United States*, *supra*, 408, 409. Only if, we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would be justified in overriding its choice of means for effecting its declared purpose of preventing inflation. *we*

hence The standards prescribed by the present Act, with the aid of the "statement of considerations" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare *Hirabayashi v. United States*, *supra*, 104. ~~And~~ we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in *Sunshine Anthracite Coal Co. v. Adkins*, *supra*, or

the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are "reciprocally unequal and unreasonable", held valid in *Field v. Clark*, *supra*.

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see *Sunshine Coal v. Adkins*, *supra*, and cases cited; or the power to approve consolidations in the "public interest", sustained in *New York Central Securities Co. v. United States*, 287 U. S. 12, 24-5 (compare *United States v. Lowden*, 308 U. S. 225); or the power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires", upheld in *National Broadcasting Co. v. United States*, *supra*, 225-6; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law, *Federal Trade Commission v. Keppel & Bros.*, 291 U. S. 304; or the direction that in allotting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in *Mulford v. Smith*, *supra*, 48-9; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in *Hampton & Co. v. United States*, *supra*; or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors" and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, *supra*.

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under §§ 4(a) and 205(b). Section 203(a) sets up a procedure by which "any person subject to any provision of a regulation or order" may within 60 days after it is issued "file a

protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections". He may similarly protest later, on grounds arising after the expiration of the original sixty days. The subsection directs that within a reasonable time and in no event more than thirty days after the filing of a protest or ninety days after the issue of the regulation protested, whichever is later, "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

Section 204(c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States. Section 204(a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. The court may issue such an injunction only if it finds that the regulation, order or price schedule "is not in accordance with law, or is arbitrary or capricious". (Subsection (b).) It is denied power to issue a temporary restraining order or interlocutory decree. (Subsection (c).) The effectiveness of any permanent injunction it may issue is postponed for thirty days, and if review by this Court is sought upon writ of certiorari, as authorized by subsection (d), its effectiveness is further postponed until final disposition of the case by this Court by denial of certiorari or decision upon the merits. (Subsection (b).)

Section 204(d) declares:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such

regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

In *Lockerty v. Phillips, supra*, we held that these provisions conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of inferior federal courts, and the jurisdiction of all state courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals.

The considerations which led us to that conclusion with respect to the equity jurisdiction of the district court, lead to the like conclusion as to its power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation. The provisions of § 204(d), conferring upon the Emergency Court of Appeals and this Court "exclusive jurisdiction to determine the validity of any regulation or order", coupled with the provision that "no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation", are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

That such was the intention of Congress appears from the report of the Senate Committee on Banking and Currency, recommending the adoption of the bill which contained the provisions of § 204(d). After pointing out that the bill provided for exclusive jurisdiction of the Emergency Court and the Supreme Court to determine the validity of regulations or orders issued under section 2, the Committee said: "The courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself." Sen. Rep. 931, 77th Cong., 2d Sess., p. 25. That the Committee, in making this statement, intended to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a crim-

inal prosecution, is further borne out by the fact that the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves. H. R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H. R. 5479, pp. 4, 7-8.

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. At the trial, petitioners offered to prove that the Regulation would compel them to sell beef at such prices as would render it impossible for wholesalers such as they are, no matter how efficient, to conduct their business other than at a loss. Section 4(d) declares that "Nothing in this Act shall be construed to require any person to sell any commodity" Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss. But they argue that to impose on them the choice either of refraining from sales of beef at wholesale or of running the risk of numerous criminal prosecutions and suits for treble damages authorized by Sec. 205(e), without the benefit of any temporary injunction or stay pending determination by the prescribed statutory procedure of the Regulation's validity, is so harsh in its application to them as to deny them due process of law. In addition they urge the inadequacy of the administrative procedure and particularly of the sixty days period afforded by the Act within which to prepare and lodge a protest with the Administrator.

In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure. The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act, that there was grave danger of war-time inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., pp. 23-5.

Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity. The organization of such an ex-

clusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction. The considerations which led to its creation are similar to, and certainly no weaker than, those which led this Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 and the long line of cases following it, to require resort to the Interstate Commerce Commission and the special statutory method provided for review of its decisions in certain types of cases involving railway rates. As with the present statute, it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. *Bradley v. Richmond*, 227 U. S. 477; *First National Bank v. Weld County*, 264 U. S. 450; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

Petitioners assert that they have been denied that opportunity because the sixty days period allowed for filing a protest is insufficient for that purpose; because the procedure before the Administrator is inadequate to ensure due process; because the statute precludes any interlocutory injunction staying enforcement of a price regulation before final adjudication of its validity; because the trial of the issue of validity of a regulation is excluded from the criminal trial for its violation; and because in any case there is nothing in the statute to prevent their conviction for violation of a regulation before they could secure a ruling on its validity. A sufficient answer to all these contentions is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint

to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 554; *Minnesota v. Probate Court*, 309 U. S. 270, 277, and cases cited. Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309; *Anniston Mfg. Co. v. Davis*, *supra*, 356-7; *Minnesota v. Probate Court*, *supra*, 275, 277. But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 U. S. C. § 307. The penal provisions of the statute are applicable only to violations of a regulation which are willful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue.

The sixty days period allowed for protest of the Administrator's regulations cannot be said to be unreasonably short in view of the urgency and exigencies of war-time price regulation.³ Here the

³ For numerous instances in which comparable or shorter periods for resort to administrative relief as a prerequisite to proceeding in the courts have been held to be sufficient, see, e. g., *Bellingham Bay & Co. v. New Whatcom*, 172 U. S. 314 (10 days); *Campbell v. Olney*, 262 U. S. 352 (20 days); *Wick v. Chelan Electric Co.*, 280 U. S. 108 (18 days); *Phillips v. Commissioner*, 283

Administrator is required to act initially upon the protest within thirty days after it is filed or ninety days after promulgation of the challenged regulation, by allowing the protest wholly or in part, or denying it or setting it down for hearing. (Section 203(a).) But we cannot say that the Administrator would not have allowed ample time for the presentation of evidence.⁴ And under § 204(a) petitioners could have applied to the Emergency Court of Appeals for leave to introduce any additional evidence "which could not reasonably" have been offered to the Administrator or included in the proceedings before him, and could have applied to the Administrator to modify or change his decision in the light of that evidence.

Nor can we say that the administrative hearing provided by the statute will prove inadequate. We hold in *Bowles v. Willingham*, No. 464, decided this day, that in the circumstances to which this Act was intended to apply, the failure to afford a hearing prior to the issue of a price regulation does not offend against due process. While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest". (§ 203(a); Revised Procedural Regulation No. 1, § 1300.39, 7 Fed. Reg. 8961.) In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process. The Act requires the Administrator to inform the protestant of the grounds for his decision denying a protest, including all matters of which he has taken official notice. (§ 203(a).) In view of the provisions for the introduction of further evidence both before and after the Administrator has announced his determination, we cannot say that if petitioners had filed a protest adequate opportunity would not have been afforded them to meet any arguments and evidence put forward by the Administrator, or that if such opportunity had been denied the denial would not have been corrected by the Emergency Court.

U. S. 589 (60 days); *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (40 days).

⁴ Revised Procedural Regulation No. 1, 7 Fed. Reg. 8961, authorized by § 203(a), contain detailed provisions for extending the time for presentation of evidence when appropriate. §§ 1300.30(c), 1300.33; 1300.35(a)(3).

The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court. Compare *White v. Johnson*, 282 U. S. 367, 374.⁵

In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. See *Ex parte Young*, 209 U. S. 123; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53-4; *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340; *Oklahoma Operating Co. v. Love*, 252 U. S. 331. For as we have seen, § 4(d) specifically provides that no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act. Compare *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 667-9.

The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity. It is true that if the Administrator denies a protest no stay or injunction may become effective before the final

⁵ Nor is the inconvenience to petitioners of being required to make their objection to the Administrator in Washington, D. C. sufficient to outweigh the public interest, in the circumstances of this case, in having a centralized, unitary scheme of review of the regulations. The protest procedure is designed to be conducted primarily upon documentary evidence, Sec. 203(a); Revised Procedural Regulation No. 1, §§ 1300.29-1300.31, 1300.39. There would thus be no purpose in the personal presence of the protestant unless the protest were set for hearing by the Administrator, and in such a case the hearing may be held at any place designated by the Administrator and before a person designated by him. *Id.*, §§ 1300.39, 1300.42. The Emergency Court of Appeals is likewise authorized to "hold sessions at such places as it may specify" and does in fact hold sessions throughout the country as needed. § 204(c); Rule 4(a) of its Rules of Procedure, 50 U. S. C. App. Supp. II following § 924..

decision of the Emergency Court or of this Court if review here is sought. It is also true that the process of reaching a final decision may be time-consuming. But while courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.

The Administrator, who is the author of the regulations, is given wide discretion as to the time and conditions of their issue and continued effect. Section 2(a) authorizes him to issue such regulations as will effectuate the purposes of the Act, whenever, in his judgment, such action is necessary. Section 201(d) similarly authorizes him "from time to time" to issue regulations when necessary and proper to effectuate the purposes of the Act. One of the objects of the protest provisions is to enable the Administrator more fully to inform himself as to the wisdom of a regulation through evidence of its effect on particular cases. In the light of that information he is authorized by § 203(a) to grant or deny a protest "in whole or in part". And § 204(a) authorizes the Administrator to modify or rescind a regulation "at any time".⁶ Moreover § 2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days, "establishing as a maximum . . . the price . . . prevailing with respect to any commodity . . . within five days prior to the date of issuance of such temporary . . . regulations. . . ."

Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. *Natural Gas Co. v. Slattery*, *supra*, 310.

In any event, we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would in the special circumstances of this case,

⁶ Revised Procedural Regulation No. 1 authorizes the filing at any time of a petition to amend a regulation, (§ 1300.20) and authorizes the Administrator to treat a protest as a petition for amendment as well (§ 1300.49).

involve a denial of constitutional right. If the alternatives, as Congress could have concluded, were war-time inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Compare *Miller v. Schoene*, 276 U. S. 272, in which we held that the Fourteenth Amendment did not preclude a state from compelling the uncompensated destruction of private property in order to preserve important public interests from destruction.

The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare *Scripps Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U. S. 4, 10 and cases cited. Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. *Meccano Ltd. v. John Wanamaker*, 253 U. S. 136, 141; *Rice & Adams v. Lathrop*, 278 U. S. 509, 514. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 51; *Ohio Oil Co. v. Conway*, 279 U. S. 813, 815.

But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.⁷ *Virginian Railway Co. v. United States*, 272 U. S.

⁷ Congress has sought to minimize the burden so far as would be consistent with the public interest by providing expeditious procedure for the review, on protest and complaint, of a regulation's validity. Thus a protest must be filed within 60 days (§ 203(a)); the Administrator must take initial action on it within a reasonable time but not more than 30 days after its filing or 90 days after the issuance of the regulation (§ 203(a)); the complaint to the Emergency Court must be filed within 30 days (§ 204(a)); that Court is directed to "prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction" (§ 204(c)); in order to promote that end as many judges as are needed may be designated

658, 672-3; *Petroleum Company v. Public Service Commission*, 304 U. S. 209, 222-3; *Dryfoos v. Edwards*, 284 Fed. 596, 603, affirmed, 251 U. S. 146; see *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 91-92. Compare *Wisconsin v. Illinois*, 278 U. S. 363, 418-21. This is but another application of the principle, declared in *Virginian Railway v. System Federation*, 300 U. S. 515, 552, that "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Cf. *Demorest, Jr. v. City Farmers Bank & Trust Co.*, Nos. 52 and 227, decided January 17, 1944.⁸

to serve on it, it may sit in divisions, and may hold sessions at such places as it may specify (§ 204(c)), and in fact it does sit in various parts of the country as the convenience of the parties may require; under its rules it is "always . . . open for the transaction of business", (Rule 4(a); 50 U. S. C. App., Supp. II following § 924); petitions for certiorari to review its decisions must be filed within 30 days (§ 204(d)); and this Court is directed to advance on the docket and expedite the decision of all cases from the Emergency Court (§ 204(d)). We cannot assume that the Administrator, who has a vital interest in the prompt and effective enforcement of the Act, would unreasonably delay action upon a protest; if he should, judicial remedies are not lacking, see *Safeway Stores v. Brown*, 138 F. 2d 278, 280.

⁸ For other instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions, see: 1. Section 16 of the Judiciary Act of 1787, 1 Stat. 82, Judicial Code § 267, 28 U. S. C. § 384, denying relief in equity where there is adequate remedy at law. 2. Section 5 of the Act of March 2, 1793, 1 Stat. 334, Judicial Code § 265, 28 U. S. C. § 379, prohibiting injunction of state judicial proceedings. 3. Act of March 2, 1867, 14 Stat. 475, 26 U. S. C. § 3653, prohibiting suits to enjoin collection or enforcement of federal taxes. 4. The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U. S. C. § 41(1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates. 5. Act of Aug. 21, 1937, 50 Stat. 738, 28 U. S. C. § 41(1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes. 6. Section 17 of the Act of June 18, 1910, 36 Stat. 557 and § 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U. S. C. §§ 380 and 380(a), requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining

Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. *Phillips v. Commissioner*, 283 U. S. 589, 595-7 and cases cited. It may take possession of property presumptively abandoned by its owner, prior to determination of its actual abandonment, *Anderson National Bank v. Lockett*, No. 154, decided February 28, 1944. For the protection of public health it may order the summary destruction of property without prior notice or hearing. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306; *Adams v. Milwaukee*, 228 U. S. 572; 584. It may summarily requisition property immediately needed for the prosecution of the war. Compare *United States v. Pfitsch*, 256 U. S. 547. As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 556; *Stoehr v. Wallace*, 255 U. S. 239, 245. Similarly public necessity in time of war may justify allowing tenants to remain in possession against the will of the landlord, *Block v. Hirsch*, 256 U. S. 135; *Marcus Brown Co. v. Feldman*, 256 U. S. 170. Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety. *Hirabayashi v. United States*, *supra*; cf. *Jacobsen v. Massachusetts*, 197 U. S. 11. Measured by these standards we find no denial of due process under the circumstances in which this Act was adopted and must be applied, in its denial of any judicial stay pending determination of a regulation's validity.

IV.

As we have seen Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any

order by one judge only to prevent irreparable injury. 7. The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101-15, regulating the issue of injunctions in labor disputes and prohibiting their issue "contrary to the public policy" declared in the Act. In several cases such statutes were held to be merely declaratory of a previously obtaining rule for the guidance of judicial discretion. See, e.g., *State Railroad Tax Cases*, 92 U. S. 575, 613 (Act of March 2, 1867); *Matthews v. Rodgers*, 284 U. S. 521, 525 (Judicial Code § 267); *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U. S. 293, 297 (Act of Aug. 21, 1937).

further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see *Douglas v. City of Jeanette*, 319 U. S. 157, 163, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in *Bradley v. City of Richmond*, *supra*, and in *Wadley Southern Ry. Co. v. Georgia*, *supra*, 667, 669, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U. S. 323, 331; *Barbour v. Georgia*, 249 U. S. 454, 460; *Whitney v. California*, 274 U. S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. v. Watson*, 287 U. S. 86. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California*, *supra*, 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U. S. 1 with *Ex parte Siebold*, 100 U. S. 371.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates pre-

scribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6(7), 10(1); *Armour Packing Co. v. United States*, 209 U. S. 56, 81; *United States v. Adams Express Co.*, 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission; and the denial of the defense in such a case does not violate any provision of the Constitution. *United States v. Vacuum Oil Co.*, 158 Fed. 536, 539-41; *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 887-8. See also *United States v. Standard Oil Co.*, 155 Fed. 305, 309-10, reversed on other grounds, 164 Fed. 376. Compare *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 196-7; *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U. S. 370, 384. Similarly it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of those orders, *United States v. Corrick*, 298 U. S. 435, 440; *White v. Johnson*, *supra*, 373-4. See also *Natural Gas Co. v. Slattery*, *supra*, 309-10.⁹

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation there would not be adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial. During the present term of

⁹ Compare the provisions of the Packers' and Stockyards Act, 7 U. S. C. §§ 194 and 195, and of the Commodity Exchange Act, 7 U. S. C. § 13(a), imposing criminal sanctions, and those of the Federal Trade Commission Act as amended, 15 U. S. C. §§ 45(g)-(1) imposing heavy penalties, for violation of an administrative order which has become final by its affirmance upon the exclusive statutory method of review provided, or by the expiration of the time allowed for review without resort to the statutory procedure.

court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. *Falbo v. United States*, 320 U. S. 549; and see *Bowles v. United States*, 319 U. S. 33. We perceive no tenable ground for distinguishing that case from this.

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. *Block v. Hirsch, supra*, 158. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury. Cf. *Falbo v. United States, supra*.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

Nos. 374, 375.—OCTOBER TERM, 1943.

374. Albert Yakus, Petitioner,
vs.
The United States of America.

Benjamin Rottenberg and B. Rot-
tenberg, Inc., Petitioners,

375 vs.
The United States of America.

On Writs of Certiorari to
the United States Circuit
Court of Appeals for the
First Circuit.

[March 27, 1944.]

Mr. Justice ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred.

When, in his judgment, commodity prices have risen, or threaten to rise, "to an extent or in a manner inconsistent with the purposes" of the Act the Administrator may establish "such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act.

"So far as practicable" in establishing any maximum price he is to ascertain the prices prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments "for such relevant factors as he may determine and deem to be of general applicability," including several factors mentioned. Before issuing any regulation he shall "so far as

practicable" advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judgment, are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U. S. C. § 902).

It will be seen that whether, and, if so, when, the price of any commodity¹ shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

The Supposed Standards for the Administrator's Guidance.

The Act provides that any regulation or order must be "generally fair and equitable" in the Administrator's judgment; but coupled with this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

Section 1(a) (50 U. S. C. § 901(a)) states seven purposes, which should be set forth separately as follows:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;"

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict anyone of error of judgment in so classifying a given economic phenomenon.

"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;"

¹ The Act gives the Administrator no power with respect to wages, and limits his powers as respects fishery commodities (50 U. S. C. § 902(1)), and agricultural commodities (50 U. S. C. § 903).

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative discretion were not sufficiently broad there is added the phrase "other disruptive practices", which seems to leave the Administrator at large in the formation of opinion as to whether any practice is disruptive.

"to assure that defense appropriations are not dissipated by excessive prices;"

It is not clear—to me at least—what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say:

"to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;"

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be "undue impairment of their standard of living" would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

"to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices;"

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the "standard" any more vague.

"to assist in securing adequate production of commodities and facilities;"

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing

policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as "arbitrary or capricious".

"to prevent a post emergency collapse of values;"

This purpose, or "standard", seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If, in his judgment, any action by him is necessary or appropriate to the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy in the post war period. His judgment, founded, as it may be, on his studies and investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in *Bowles v. Willingham*, No. 464. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, leaves no doubt that the decision is now overruled. There, as here, the "code" or regulation, to become effective, had to be found by the Executive to "tend to effectuate the policy" of the Act. (See footnote 3, p. 521.)

The Administrator's Procedure.

I have not yet spoken of the statutory provisions respecting the permissible procedure of the Administrator in imposing prices. Sec. 202(a) (50 U. S. C. § 922(a)) authorizes him to make such studies and investigations and to obtain such information as he

deems necessary or proper to assist him in prescribing any regulation or order, or in the administration and enforcement of the Act and regulations, orders, and price schedules thereunder. The remaining subsections give him broad powers to compel disclosure of information. And he may take official notice of economic data and other facts, including facts found as a result of his investigations and studies (§ 203(b), 50 U. S. C. § 923(b)).

Each regulation or order must be accompanied by a "statement of the considerations involved" in its issue (§ 2(a), 50 U. S. C. § 902(a)). This is not a statement or finding of fact. Webster defines the term "consideration" as "that which is, or should be, considered as a ground of opinion or action; motive; reason." The citizen, therefore, is merely to be advised of the reasons for the Administrator's action.

How is he to proceed if he desires to challenge that action? The answer is found in § 203 (50 U. S. C. § 923). Within a specified time after the issue of a regulation any person subject to any provision of it may file a protest "specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." The Administrator may receive statements in support of the regulations and incorporate them in his proceedings. Within a time fixed he must (1) grant or deny the protest in whole or in part, (2) note it for hearing, or (3) provide an opportunity to present further evidence. His is the choice.

If he denies the protest in whole or in part he must inform the protestant of the grounds upon which his decision was based and of any economic data or other facts of which he has taken official notice.

This, then, is the first opportunity the protestant has to know on what the Administrator has based his "considerations" or reasons for action. As the Emergency Court of Appeals held in *Lakemore Company v. Brown*, 137 F. 2d 355:²

"Thus, consistently with statutory requirements, the Administrator could have waited until he had entered his order denying the protest before informing the protestant of the economic data of which he had taken official notice and of the economic conclusions which he had derived therefrom and the other grounds upon which the denial was based."

² In citing cases decided by that court, I do so with no thought that in construing the Act's provisions that court has erred. On the contrary, I cite its interpretations of the statute as supporting my views that, as properly construed, the Act is invalid.

And it is to be observed that, after seeing the protestant's affidavits and the evidence, the Administrator may load the record with all sorts of material, articles, opinions, compilations, and what not—pure hearsay—subject to no cross-examination, to persuade the court that his order could, "in his judgment", promote one of the "purposes," of the Act.

Thus is the "record" weighted against formal complaint in court.

Chatlos v. Brown, 136 F. 2d 490, *Spaeth v. Brown*, 137 F. 2d 669, and *Bibb Manufacturing Co. v. Bowles* (decided January 12, 1944), amongst other cases, indicate the sort of data—although they do not exclude the use of other sorts—on which the Administrator seems to be accustomed, and to be entitled, to act. He need make no findings of fact.

The Court Review.

The protestant who is aggrieved by the denial or partial denial of his protest may, within a set time, file a complaint with a specially created Emergency Court of Appeals "specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." The court is given exclusive jurisdiction and all other courts are forbidden to take jurisdiction to grant such relief. The court may set aside the order, dismiss the complaint, or remand the proceeding. Upon the filing and service of the complaint, the Administrator is to certify and file a transcript of such portion of the proceedings before him as are material to the complaint (§ 204(h); 50 U. S. C. § 924(a)).

The section proceeds:

"No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall

certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court."

It is not difficult to picture the plight of the protestant. The Administrator's statement of considerations, without more, constitutes proof in the cause.

In *Montgomery Ward & Co. v. Bowles*, 138 F. 2d 669, the Administrator in his statement of considerations said that he took official notice of three propositions of the most general scope. No evidence in support of these or of any other facts upon which he relied was included in the transcript. The complainant suggested to the court the omission of pertinent matter, namely, the evidence in support of the propositions of which the Administrator said he took official notice, the evidence of various other assertions of fact in his opinion, and the particular facts and evidence upon which he based the conclusions expressed in his statement of considerations that "the maximum prices established in this regulation are fair and equitable." The Administrator objected to the suggestion and the court rejected it. It was held that the Act requires "only a summary statement of the basic facts which justify the regulation."

Referring to § 204(b), 50 U. S. C. § 924(b), the court held that the requirement that the complainant must establish "to the satisfaction of the court" that the regulation, order, or price schedule is not in accordance with law or is arbitrary or capricious throws upon the protestant the burden "to bring forward and satisfactorily prove the invalidating facts", and added: "Unless and until he does so the regulation is to be taken as valid and the existence of a state of facts which justify it is to be assumed without the necessity of proof thereof by the Administrator."

The court added that the protestant is given means of carrying this burden by filing affidavits and other evidence, but omits to refer to the fact that these affidavits and other evidence must be addressed to the Administrator's order and his most general and sweeping statement of considerations, which merely means his reasons for making the order. These affidavits and this evidence under the procedure prescribed are to be put in before the protestant even knows what data the Administrator relied upon or sees the Administrator's opinion denying his protest. It is hardly

necessary to dilate upon the burden thus placed on a protestant or the extent to which he is compelled to fill the record with what he may think relevant matter only to find that he has been shooting at straws. The court further adverted to the fact that the Act permits the protestant to state in detail in connection with his protest the nature and sources of any farther evidence not subject to his control upon which he believes he can rely in support of the facts alleged in his protest. Here again the protestant is under the same handicap. He must disclose all he has in mind to the Administrator before the Administrator makes any disclosure to him of the facts and data upon which that official has relied.

Finally the court refers to the privilege given the protestant to file a brief with the Administrator and to "request an oral hearing", without mentioning the facts that the brief can be addressed only to the reasons given in the statement of consideration, and that the Administrator is at liberty to deny the request.

A procedure better designed to prevent the making of an issue between parties can hardly be conceived.

And the extent of the burden is further emphasized by what the Emergency Court of Appeals has said in *Lakemore Co. v. Brown, supra*:

"It is objected that the Administrator thus in effect has prejudged the case; that as witness, immune from cross-examination, he has rendered an opinion which concludes the matter which is before him as judge.

"This overlooks the fact that the Administrator, from the necessities of the case, does not come with a virgin mind to the consideration of a protest. He has previously performed the official act of issuing the regulation, the terms of which of course reflect his conclusions on many economic, administrative and legal questions. In this sense, he necessarily approaches consideration of a protest with certain 'preconceived notions'—to use complainant's phrase. It is the object of the protest procedure to give the Administrator a chance to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. What the Administrator did here was to lay his cards on the table in the protest proceedings, offering protestant an opportunity to play its trump cards, if it had any.

"Of course such statements of economic conclusions thus incorporated in the record are not 'evidence'. Section 204(a) re-

quires the transcript of the protest proceedings, filed in this court, to 'include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice.' Insofar as any economic generalizations or conclusions formulated by the Administrator constitute indispensable steps in his process of reasoning in denying the protest, it is for this court to say whether they have any rational basis, in performance of our statutory duty to consider whether the regulation or order should be set aside in whole or in part as being 'arbitrary or capricious.' This is so, whether the Administrator includes such generalizations and conclusions in his opinion accompanying the denial of the protest or, as in this case, incorporates them into the record of the protest proceedings at an earlier stage in order to afford protestant an opportunity for rebuttal."

To this may be added what the Emergency Court said in *Madison Park Corporation v. Bowles*, (decided December 27, 1943):

"We do not decide that this Court should limit the application of the term 'generally fair and equitable' standards mentioned in the law and in discussions of its enactment while pending in Congress. (sic) It may be possible that a case will occur in which the effect of a regulation established by the Administrator clearly will be shown to be generally unfair and inequitable on grounds not mentioned. But in such a case the reasons must be clear and compelling. The Act provides the Administrator may establish such rents as *in his judgment* will be generally fair and equitable. Review in this Court is plainly limited. It may not substitute its judgment for the judgment of the Administrator, but may act in review only when it finds the regulation is not in accordance with law or is arbitrary and capricious. Thus if the Court finds any reasonable basis to support the view that the regulation deals fairly and equitably with the industry concerned, the regulation must stand." (Italics in original.)

When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.

No court is competent, on a mass of economic opinion consisting of studies by subordinates of the Administrator, charts and graphs prepared in support of the studies, and economic essays gathered

hither and yon, to demonstrate, beyond doubt, that the considerations or conclusions of the Administrator from such material cannot support the Administrator's judgment that what he has done by way of regulation or price schedule tends to prevent post war collapse of values, or to prevent dissipation of defense appropriations through excessive prices, or to prevent impairment of the standard of living of persons dependent on life insurance, or to prevent hardship to schools—to enumerate but a few of the stated purposes of the Act.

It is not surprising that, in the thirty-one cases decided by the Emergency Court of Appeals of which I have found reports, complaints have been dismissed in twenty-eight, and but three have been remanded to the Administrator for further proceedings.³ Two of the three involved no question of merits under the statutory provisions.

The War Power.

The Emergency Court of Appeals in *Taylor v. Brown*, 137 F. 2d 654, overruled a challenge to the constitutional validity of the Act's delegation of legislative power to the Administrator by invocation of the "War Power" of Congress, the powers embodied in Article I, Section 8, of the Constitution "to declare War", "to raise and support Armies", "to provide and maintain a Navy," and "to make all Laws which shall be necessary and proper for carrying into Execution" those powers. After showing, what needs no argument, that these powers of Congress are very different from those to be exercised in peace, the court then—without a sign that it realizes the great gap in the process—assumes that one of Congress' war powers is the power to transfer its legislative function to a delegate. By the same reasoning it could close this court or take away the constitutional prerogatives of the President as "War measures".

I am not sure how far this court's present opinion adopts the same view. There are references in it to the war emergency, and yet the reasoning and the authorities cited seem to indicate that the delegation would be good in peace time and in respect of peace time administration. And the Emergency Court of Appeals, in spite of its decision in *Taylor v. Brown*, *supra*, and its statement in *Phila. Coke Co. v. Bowles* (decided December 15,

³ *Armour & Co. v. Brown* (August 6, 1943); *Montgomery Ward & Co. v. Bowles*, 138 F. 2d 669; *Hillcrest Terrace Corp. v. Brown*, 137 F. 2d 663.

1943) that, as the Act is an exercise of the war power and therefore does not deprive citizens of property without due process, has, nevertheless, weighed provisions of the Act as against the guaranty of the Fifth Amendment in *Wilson v. Brown*, 137 F. 2d 348, and in *Anant v. Bowles* (decided December 31, 1943).

I am sure that my brethren, no more than I, would say that Congress may set aside the Constitution during war. If not, may it suspend any of its provisions? The question deserves a fair answer. My view is that it may not suspend any of the provisions of the instrument. What any of the branches of government do in war must find warrant in the charter and not in its nullification, either directly or stealthily by evasion and equivocation. But if the court puts its decision on the war power I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose "judgment" will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishments will be imposed by courts as matters of routine.

If, on the contrary, such a delegation as is here disclosed is to be sustained even in peacetime, we should know it.

SUPREME COURT OF THE UNITED STATES.

Nos. 374, 375.—OCTOBER TERM, 1943.

Albert Yakus, Petitioner,

374

U.S.

The United States of America.

Benjamin Rottenberg and B.

Rottenberg, Inc., Petitioners,

375

U.S.

The United States of America.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
First Circuit.

[March 27, 1944.]

Mr. Justice RUTLEDGE, dissenting.

I agree with the Court's conclusions upon the substantive issues. But I am unable to believe that the trial afforded the petitioners conformed to constitutional requirements. The matter is of such importance as requires a statement of the reasons for dissent.

The Emergency Price Control legislation is unusual, if not unique. It is streamlined law in both substance and procedure. More than any other legislation except perhaps the Selective Service Act, in the combined effect of its provisions it attenuates the rights of affected individuals. The Congress regarded this as necessary, though it sought to preserve as much of individual right as it felt was consistent with controlling wartime inflation. To that judgment we owe all deference, saving only what we owe to the Constitution.

War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be impaired. But not all are lost. War expands the nation's power. But it does not suspend the judicial duty to guard whatever liberties will not imperil the paramount national interest.

I.

Judged by normal peacetime standards, over-all nation-wide price control hardly has accepted place in our institutions. Notwithstanding the considerable expansion of recent years in this respect, the extension has been piecemeal.¹ Until now it has not enveloped the entire economy.² Whether control so extensive might be upheld in some emergency not created by war need not now be decided. That it can be supported in the present circumstances and for the declared purposes there can be no doubt. It is enough, as the Court points out, that legal foundation exists in the nation's power to make war, as this has been given to Congress and the Chief Executive. Cf. *Hirabayashi v. United States*, 320 U. S. 81.³

The foundation has relevance for each of the issues. And generally it has significance for the application of peacetime precedents. Decisions made then with limitations, explicit or implied, not affected by influence of the war power and the conditions of a state of war, cannot be wholly conclusive in their limiting effect upon the exercise of war-making authority. Care must be taken therefore, in applying them, both to see that they are observed so far as the dominant necessity permits and to be equally sure they are not misapplied to hamstringing essential authority.⁴

As it is with the substantive control, so it is with delegating legislative power. War begets necessities for this, as for imposing substantive controls, not required by the lesser exigencies of more normal periods. In this respect certainly there is as much room for difference as exists when Congress is dealing wholly with internal matters and when it is acting with the President about foreign affairs. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304. Not only the broader power of Congress, but its conjunction in the particular delegation with the wider authority of the President, both as chief magistrate and as commander-in-chief, goes to sustain the greater delegation. Cf. *Hirabayashi v. United States*, *supra*. But the present legislation, as the Court's

¹ Cf., e. g., *Nebbia v. New York*, 291 U. S. 502.

² Perhaps the nearest previous approach to control so extensive was in the National Industrial Recovery legislation.

³ Cf. note 18 *infra*.

⁴ It goes without saying that whatever scope is allowed for operation of governmental authority in peace continues to be effective in war.

opinion demonstrates, does not go beyond the limits allowed by peacetime precedents in the substantive delegation.⁵

II

My difficulty arises from the Act's procedural provisions. They too are unusual. That is true, though each save one has been used before, and sustained, in separate applications. No previous legislation has presented quite this combination of procedural devices.⁶ In the combination, if in nothing more, unique quality would be found. But there is more.

Congress sought to accomplish two procedural objectives. One was to afford a narrow but sufficient method for securing review and revision of the regulations. At the same time the Act created broad and ready methods for enforcement. The short effect of the procedure is to give the individual a single channel for questioning the validity of a regulation, through the protest procedure and the Emergency Court of Appeals, with review of its decisions here on certiorari. Section 204. On the other hand, the varied and widely available means for enforcement include criminal proceedings, suits in equity, and suits for recovery of civil penalties, in the federal district courts and in the state courts. Section 205(a), (b), (c). See also Section 205(d), (e), (f).⁷ And in all these enforcement proceedings the mandate of Section 204(d) is that the court shall have no "jurisdiction or power to consider the validity of" a regulation, order or price schedule. The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many. And in the enforcement proceedings the issues are cut down so that, in a practical sense, little else than the fact whether a violation of the

⁵ E.g., the administrator has no power to adopt codes of fair competition generally, such as was given under N. I. R. A. His principal function is single; to determine and make effective by regulation the maximum price at which a commodity may be sold. The task is vast and complex, in comparison with previously sustained price-fixing delegations, by virtue of the number of industries and items affected and the nation-wide scope of the authority. But the focus of the price-fixing function is narrow, although powerful, in its incidence upon a particular industry or operator.

⁶ Cf. Judicial Review of Price Orders under the Emergency Price Control Act (1942) 37 Ill. L. Rev. 256, 263-264; and other materials cited *infra* notes 20, 21.

⁷ By Section 205(f)(1), (2) licensing authority is given to the administrator, with special provisions for suspension for not more than twelve months by proceedings in state, territorial or federal district courts.

regulation as written has occurred or is threatened may be inquired into.⁸

Disparity in remedial and penal measures does not necessarily invalidate the procedure, though it has relevance to adequacy of the remedy allowed the individual.⁹ Congress has broad discretion to open and close the doors to litigation. In doing so it may take account of the necessities presented by such a situation as it was dealing with here. To follow the usual course of legislation and permit challenge by restraining orders, injunctions, stay orders and the normal processes of litigation would have been, in this case, to lock the barn door after the horse had been stolen. There was therefore compelling reason for Congress to balance the scales of litigation unevenly, if only it did not go too far. In no other way could it protect the paramount national interest. If the result, within the permissible limits, is harsh or inconvenient for the individual, that is but part of the price he, with all others, must pay for living in a nation which ordinarily gives him so much of protection but in a world which has not been organized to give it security against events so disruptive of democratic procedures.

I have no difficulty with the provision which confers jurisdiction upon the Emergency Court of Appeals to determine the validity of price regulations or, if that had been all, with the mandate which makes its jurisdiction in that respect exclusive. Equally clear is the power of Congress to deprive the other federal courts of jurisdiction to issue stay orders, restraining orders, injunctions or other relief to prevent the operation of price regulations or to set them aside. So much may be rested on Congress' plenary authority to define and control the jurisdiction of the federal courts. Constitution, Article III, Section 2; *Lockerty v. Phillips*, 319 U. S. 182. It may be taken too, for the purposes of this case, that Congress' power to channel enforcement of federal authority through the federal courts sustains the like prohibitions it has placed on the state courts.¹⁰ Without more, the statute's provisions would

⁸ It is conceded that questions concerning the validity of statutory provisions, as distinguished from regulations, remain determinable by enforcing courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., 24-25, and compare H. R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency on H. R. 5479, 77th Cong., 2d Sess., 4, 7-8.

⁹ Cf. Parts IV, V, *infra*.

¹⁰ The *Moses Taylor*, 4 Wall. 411; *Bowles v. Willingham*, No. 464, decided this day; cf. *Claffin v. Houseman*, Assignee, 93 U. S. 130; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511.

seem to be unquestionably within the Congressional power. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

Congress however was not content to create a single national tribunal, give it exclusive jurisdiction to determine all cases arising under the statute, and deny jurisdiction over them to all other courts.¹¹ It provided for enforcement by civil and criminal proceedings in the federal district courts and in the state courts throughout the country.

This, too, it could do, though only if adequate proceedings, in the constitutional sense, were authorized. And I agree that the enforcing jurisdiction would not be made inadequate merely by the fact that no stay order or other relief could be had pending the outcome of litigation. Confronted as the nation was with the imminent danger of inflation and therefore the necessity that price controls should become effective at once and continue so without interruption at least until invalidated in particular instances, Congress could require individuals to sustain, in deference to the paramount public interest, whatever harm might ensue during the period of litigation and until each had demonstrated the invalidity of the regulation as it affected himself.¹² Runaway inflation could not have been avoided in any other way. The lid had to go on, go on tight and stay tight. This necessity united with the general presumption of validity which attaches to legislation¹³ and Congress' power to control the jurisdiction of the courts to sustain its denial of power to all courts, including the enforcing courts, the Emergency Court and this one,¹⁴ to suspend operation of the regulations pending final determination of validity.

¹¹ This it might have done, subject only to the requirement that the procedure specified for the single competent court afford a constitutionally adequate mode for determining the issues. *Myers v. Bethlehem Shipbuilding Corp.*, *supra*. In case criminal jurisdiction were conferred, observance of the requirements of Article III, § 2, and of the Fifth and Sixth Amendments concerning such trials would be required. Cf. text *infra*, Parts V, VI.

¹² Cf. *L'Hote v. New Orleans*, 177 U. S. 587; *Welch v. Swasey*, 214 U. S. 91; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.

¹³ *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-154.

¹⁴ By Section 204(b) of the Act, the effectiveness of a judgment of the Emergency Court enjoining or setting aside the regulation, in whole or in part, is postponed until the expiration of thirty days from its entry and, if certiorari is sought here within that time, the postponement continues until this Court's denial of the writ becomes final or until other final disposition of the case by this Court. By Section 204(d) the Emergency Court and this Court

The crux of this case comes, as I see it, in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them "jurisdiction or power to consider the validity" of the regulations for which enforcement is thus sought. This question which the Court now says "presents no novel constitutional issue" was expressly and carefully reserved in *Lockerty v. Phillips*, *supra*. The prohibition is the statute's most novel feature. In combination with others it gives the procedure a culminating summary touch and presents questions different from those arising from the other features.

The prohibition is unqualified. It makes no distinction between regulations invalid on constitutional grounds and others merely departing in some respect from statutory limitations, which Congress might waive, or by the criterion whether invalidity appears on the face of the regulation or only by proof of facts. If the purpose and effect are to forbid the enforcing court to consider all questions of validity and thus to require it to enforce regulations which are or may be invalid for constitutional reasons, doubt arises in two respects. First, broad as is Congress' power to confer or withhold jurisdiction, there has been none heretofore to confer it and at the same time deprive the parties affected of opportunity to call in question in a criminal trial whether the law, be it statute or regulation,¹⁵ upon which the jurisdiction is exercised squares with the fundamental law. Nor has it been held that Congress can forbid a court invested with the judicial power under Article III to consider this question, when called upon to give effect to a statutory or other mandate.

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations,

are given exclusive jurisdiction to determine the validity of the regulation and all other courts are denied "jurisdiction or power to consider" this question and to stay, restrain, enjoin or set aside any provision of the regulation or its enforcement. The net effect is to deprive all courts of power to suspend operation of the regulation pending final decision on its validity and to keep it in force until a final judgment of the Emergency Court, or of this Court on review of its decision, becomes effective.

¹⁵ Cf. text *infra*, Part III, at notes 16, 17.

or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.

III.

The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional requirements. At a time when administrative action assumes more and more of the law-making function,¹⁶ it would seem the balance of advantage, if any, should be the other way. But there is none. The statute has impact upon individuals only through the regulations. They are in effect part of the Act itself, unless invalid. If invalid, they rule, just as the statute does, until set aside. And, in respect to constitutional requirements, they have no more immunity than the statute itself.¹⁷

Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation. And it is conceded that Congress could not have

¹⁶ There hardly can be question that whenever an administrative agency, acting within the discretion validly conferred upon it by Congress, promulgates a regulation or issues an order of general applicability it is "making the law," as effectively as is Congress when it enacts a specific prescription, by whatever name this may be called. *United States v. Grimaud*, 220 U. S. 506; *Avent v. United States*, 266 U. S. 127; *United States v. Michigan Portland Cement Co.*, 270 U. S. 521.

¹⁷ Cf. the dissenting opinion of Mr. Justice Roberts. The notion that Congress somehow could cut off review of regulations for constitutional invalidity when it could not do so for statutes, of which suggestions appear in the legislative history and the briefs, was not adhered to in the oral argument as to regulations void on their face and is not tolerable when the effect would be to make the courts instruments for enforcing unconstitutional mandates. Cf. Part VI, *infra*.

compelled judicial enforcement of all price regulations, without regard to their validity, if it had not given opportunity for attack upon them through the Emergency Court or if that opportunity is inadequate. But because the opportunity is afforded and is deemed adequate in the unusual circumstances, at any rate for some of its purposes, and because it was not followed, the Court holds that criminal enforcement must be given and the enforcing court cannot consider the question of validity.

If I understand it, the argument to sustain the conviction, in its broadest form, rests upon the proposition that Congress, by providing in one proceeding a constitutionally adequate mode for deciding upon the validity of a law or regulation, and requiring this to be followed within a limited time, can cut off all other right to question it and make that determination, or the failure to secure it in time, conclusive for all purposes and in all other proceedings. The proposition cannot be accepted in that broad form. To do so would mean, for instance, that if in this case a regulation had prescribed one maximum price for sales by merchants of one race or religion and a lower one for distributors of another, the judicial power of the United States would have to be exercised to convict the latter for selling at the former's price, if they had not availed themselves of the limited review afforded by this Act. It hardly would be consistent with accepted ideas of due process or equal protection for any court to impose penalty or restraint in such a case.¹⁸ And I cannot imagine this Court as sustaining such a conviction or any other as imposing it.¹⁹

The illustration is extreme and improbable of occurrence. But it serves to test the broad contention. Such a doctrine established as generally applicable would contain seeds of influence too dangerous for acceptance, more especially for the determination of criminal matters. No authority compels or enjoins this. And I am unwilling to give the idea adherence in particular applications without stating qualification which confines its possible effects to situations where the gravest dangers to the nation's interest exist and cannot be escaped in any other way.

¹⁸ See note 17 *supra*. The unique circumstances involved in *Hirabayashi v. United States*, 320 U. S. 81, confine that case to its facts, including the particular emergency with which legislation there under review had dealt, as respects the issue of equal protection.

¹⁹ Cf. notes 23, 33 *infra*.

The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes? This question is the most important one in the case and demands explicit attention. "It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding."²⁰ But to make this easy assumption is at once to decide the rock-bottom issue and, in my opinion, one this Court has not determined heretofore with effects upon the criminal process like those produced in this case.²¹

IV.

It is true that in a variety of situations and for a variety of reasons a person is foreclosed from raising issues, including some constitutional ones, where he has failed to exercise an earlier opportunity. Thus ordinarily issues cannot be raised on appeal which were not presented in the trial court. And a variant is that federal questions not raised in the state courts generally will not be considered here.²²

But such instances of foreclosure, whether legislative or judicial in origin, do not support the broader basis of argument in this case. Two things are to be emphasized. One is that the previous

²⁰ McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 Calif. L. Rev. 129, 166.

²¹ *Ibid.* Cf. *Judicial Review of Price Orders Under the Emergency Price Control Act* (1942) 37 Ill. L. Rev. 256, 263; Stason, *Timing of Judicial Redress from Erroneous Administrative Action* (1941) 25 Minn. L. Rev. 560, 575, 576-581; *Administrative Features of the Emergency Price Control Act* (1942) 28 Va. L. Rev. 991, 998, 999; Reid and Hatton, *Price Control and National Defense* (1941) 36 Ill. L. Rev. 255, 283-284. For an analysis of litigation under this Act see Sprecher, *Price Control in the Courts* (1944) 44 Col. L. Rev. 34.

²² The foreclosure may be founded upon notions of waiver, comity, putting an end to litigation, securing orderly procedure or the advantages of having available for consideration in the later stages the informed judgment of the trial tribunal, or some combination of these and other considerations. Cf. Stason, *Timing of Judicial Review from Erroneous Administrative Action* (1941) 25 Minn. L. Rev. 560, 576-581; Berger, *Exhaustion of Administrative Remedies* (1939) 48 Yale L. J. 980, 1006. And the rule against allowing collateral attack, where a judgment is involved, is relevant to the broad problem of foreclosure.

opportunity is in an earlier phase of the same proceeding, not as here a separate and independent one of wholly different character. In other words, the determination of guilt or other matter ultimately in issue is not cut up into two separate, distinct and independent proceedings in different tribunals, in which neither body has power to consider and decide all the issues, but each can determine them only in part. The other thing for stress is that the foreclosure by failure to take the earlier chance is not universally effective. And this is true particularly of constitutional questions, some of which may be raised at any time.²³ While Congress has plenary power to confer or withhold appellate jurisdiction, cf. *Ex parte McCordle*, 7 Wall. 506, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court "power to consider" constitutional questions relating to the law in issue.

If the foreclosure is not always effective when the earlier phase of litigation is wholly judicial, it hardly should be when this consists of administrative or of both administrative and judicial proceedings, still less when these are civil in character and the later enforcement phase is criminal. In the enforcement of administrative orders the courts have been assiduous, perhaps at times extremely so,²⁴ to see that constitutional protections to the persons affected are observed. By trial and error, ways have been found to give the administrative process scope for effective action and yet to maintain individual security against abuse, especially in respect to constitutional rights.²⁵ The instances closest to the

²³ Commonly it is said that "jurisdictional" questions, particularly concerning the court's power to deal with the subject matter, may be raised at any stage or in a collateral attack. And this seems to be true also of some other constitutional issues through challenge to judgments by habeas corpus proceedings long after the judgment has become final. Cf., e.g., *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371; *Johnson v. Zerbst*, 304 U. S. 458; *Mooney v. Holohan*, 294 U. S. 103. Compare Revised Rules of the Supreme Court of the United States 27, paragraph 6; cf. *Weems v. United States*, 217 U. S. 349, 362; *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547; *Brasfield v. United States*, 272 U. S. 448; *Mahler v. Eby*, 264 U. S. 32, 45.

²⁴ Compare *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287; *Crowell v. Benson*, 285 U. S. 22; *St. Joseph's Stockyards Co. v. United States*, 298 U. S. 38; *Utah Fuel Co. v. National Bituminous Coal Comm.*, 306 U. S. 56, with *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

²⁵ E. g., compare *Federal Trade Commission v. Gratz*, 253 U. S. 421 with *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; cf. also *Morgan v. United States*, 298 U. S. 468; 304 U. S. 1; 307 U. S. 183. Compare note 24 *supra*; and see *Ng Fung Ho v. White*, 259 U. S. 276.

problem here have provided for attaching penalties, including criminal sanctions, to violations of orders. But generally by one method or another means have been supplied for postponing their impact, at any rate irrevocably, until after the order's validity has been established.²⁶ And in that effort this Court has joined.²⁷

Whatever may be the limitations on judicial review in criminal proceedings under other administrative enforcement patterns,²⁸ no one of these arrangements goes as far as the combination presented by this Act. It restricts the individual's right to review to the protest procedure and appeal through the Emergency Court of Appeals. Both are short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations. Protest must be filed within the sixty-day period. After that time, no protest can be made and no review can be had, except upon grounds arising later. Section 203(a).²⁹ The only right is to submit written evidence and argument to the administrator. See

²⁶ Thus, in some cases review and enforcement are concentrated exclusively in the same court. Cf. National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, giving the circuit courts of appeal exclusive jurisdiction to review and enforce the board's orders, to which no penalty attaches until the board has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority. Likewise, when there is provision for stay or suspension of the order pending determination of its validity, e.g., the Securities Act of 1933, 48 Stat. 81, 15 U. S. C. § 77i; the Securities Exchange Act of 1934, 48 Stat. 902, 15 U. S. C. § 78y; the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. § 79x. And this is true where the enforcing court is not forbidden to consider the validity of the order, a prohibition entirely novel to the Emergency Price Control Act.

²⁷ Cf. *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, and authorities cited. In notable instances, also, where no specific provision has been made for either judicial review or avoiding the irrevocable impact of possibly invalid administrative action, and review has not been expressly denied, the courts have been ready to find means for review and for averting the impact of the penalty until it has been had. E.g., *Ex parte Young*, 209 U. S. 123; cf. *Southern Ry. v. Virginia*, 290 U. S. 190.

²⁸ Cf. *McAllister*, *op. cit. supra*, note 20; and note 26 *supra*.

²⁹ Apparently it is contemplated that the "affidavits or other written evidence" submitted in support of the objections be filed with the protest, though later submissions may be made at times and under regulations prescribed by the administrator, or when ordered by the Emergency Court, or to that court when the administrator requests. Sections 203(a), 204(a). The administrator is authorized to permit filing of protest after the sixty days have expired solely on grounds arising after that time. Section 203(a). He is required to grant or deny the protest, in whole or in part, notice the protest for a hearing, or provide an opportunity to present further evidence, within thirty days after

tion 203(c).. There is none to present additional evidence to the court.³⁰ Necessarily there is none of cross-examination. No court can suspend the order unless or until a judgment of the Emergency Court invalidating it becomes final.³¹ The penalties, civil and criminal, attach at once on violation and, it would seem, until the contrary is decided, with finality.³² At any rate that is the statute's purport. In short, the statute as drawn makes not only the regulation but also the penalties immediately and fully effective without regard to whether protest is made, the protest proceeding is carried to conclusion, or what the conclusion may be, except, and this is by inference, that violation after the order finally is held invalid may not be punishable.

This is the scope and reach of the statute. It is greater than any this Court heretofore has sustained.³³ It places the affected individual just where the Court, speaking through Mr. Justice Lamar in *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 662, said he could not be put: "He must obey what may finally be held to be a void order, or disobey what may ultimately be held

the protest is filed or ninety days after issuance of the regulation or order, or in the case of a price schedule ninety days from the effective date, whichever occurs later. *Ibid.*

³⁰ Cf. note 29 *supra*. In the Emergency Court of Appeals, "no objection to [the] regulation . . . and no evidence in support of any objection thereto, shall be considered . . . unless such objection." has been set forth in the protest or such evidence is in the transcript. Additional evidence can be admitted only if it was "either offered to the Administrator and not admitted [by him] or . . . could not reasonably have been offered to . . . or included by the Administrator in such proceedings." In that case it is to be presented to the administrator, received by him and certified to the court together with any modification he may make in the regulation. Where the administrator so requests, however, such additional evidence "shall be presented directly to the Court." Section 204(a).

³¹ Cf. note 14 *supra*.

³² That is true whether the infraction occurs before or after the time for protest or appeal has passed and, it would seem, notwithstanding the protestant may proceed with all diligence. The statute makes no provision for relieving from its penal sanctions one who follows the protest procedure to the end in case the protest eventually is sustained, if meanwhile he disobeys the order. Punishment is not made dependent on or required to await the outcome of that proceeding. Rather, the enforcing court is commanded not to consider validity. The command is unqualified, unvarying and universal. It is cast in the compelling terms of "jurisdiction." Under the statute's provisions, it applies as much when trial and conviction occur before the Emergency Court's decision is final as afterwards.

³³ Cf. *Bradley v. Richmond*, 227 U. S. 477, which involved a state prosecution for violating a state law. In affirming the conviction, this Court rejected the contention that the administrative determination on which prosecution rested was unconstitutional. But it would not follow from the fact a state

to be a lawful order." Yet the Court holds this special proceeding "adequate" and therefore effective to foreclose all opportunity for defense in a criminal prosecution on the ground the regulation is void.

This is no answer. A procedure so summary, imposing such risks, does not meet the requirements heretofore considered essential to the determination or foreclosure of issues material to guilt in criminal causes. It makes no difference that petitioners did not follow the special procedure. The very question, posed in the Court's own terms, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide. Unless it is decided, the question of adequacy, in any sense heretofore received, has not been determined, or an entirely new conception of adequacy has been approved.

V.

But there is a deeper fault, even if we assume what neither the statute nor the Court's opinion today justifies, that a potential of-

might thus condition its criminal proceedings consistently with the Fourteenth Amendment's requirement of due process that Congress can do likewise for federal criminal trials. Cf. *infra* Part V. *Wadley Southern Ry. v. Georgia*, *supra*, also involved a state suit for civil penalty for violation of a state administrative order, to which the limitations of the Sixth Amendment would not apply. The dicta which the Court regards as pointing to the validity of the procedure here do not sustain it, not only for this reason, but because the special procedure was different, did not purport to foreclose defense to enforcement if not followed, and expressly asserted that, if followed, penalty could be imposed only for violations taking place after the order was adjudicated valid, not beforehand. ~~The~~ ^{This} case involves the very risk the Court there said could not be imposed.

Other instances relied on by the Court involve only civil, not criminal consequences, or distinguishable instances of criminal prosecution, and therefore have no conclusive bearing here. As the Court seems to recognize, the question now presented was not presented or considered in *Armour Packing Co. v. United States*, 209 U. S. 56, or in *United States v. Adams Express Co.*, 229 U. S. 381. And it was not involved or determined in the cited decisions, either here or in the inferior federal courts, dealing with carriers who violate tariffs framed and filed by themselves and thereby become subject to penalty. The same is true of the cases holding that threatened criminal prosecution for violation of administrative orders cannot be enjoined.

In these decisions, none of the statutes forbade the enforcing court "to consider the validity" of the orders, none afforded a special proceeding so summary as that provided here, and only *United States v. Vacuum Oil Co.*, 158 Fed. 536, raised a constitutional question relevant here. *Falbo v. United States*, 320 U. S. 549, involved a different procedure and a different and more urgent problem. Compare Part VII *infra*. It may be doubted the decision's effect is to preclude the enforcing court from examining constitutional questions affecting the order's validity.

fender who successfully challenges the constitutionality of a regulation or begins a challenge on constitutional grounds in the Emergency Court at any time before or during the criminal prosecution, cannot be convicted, at least until after final decision that the order is valid. There still remain those cases where he has either challenged unsuccessfully in the Emergency Court or has not challenged at all. In them the would-be offender is subject to criminal prosecution without a right to question in the criminal trial the constitutionality of the regulation on which his prosecution and conviction hinge. And this seems to be true without distinction as to the character of the ground on which he seeks to make the issue. To say that this does not operate unconstitutionally on the accused because he has the choice of refraining from violation or of testing the constitutional questions in a civil proceeding beforehand entirely misses the point. The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question. In short, his trial for the crime is either in two parts in two courts or on only a portion of the issues material to guilt in one court. This may be all very well for some civil proceedings. But, so far as I know, criminal proceedings of this character never before have received the sanction of Congress or of this Court. That, like many other criminals, an offender here can be punished for making the wrong guess as to the constitutionality of the regulation, I have no doubt. But that, unlike all other criminals, he can be convicted on a trial in two parts, one so summary and civil and the other criminal or, in the alternative, on a trial which shuts out what may be the most important of the issues material to his guilt, I do deny.

The Sixth Amendment guarantees to the accused "in all criminal prosecutions . . . the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." By Article III, Section 2, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." And, by the same section, "The judicial Power," which is vested in the supreme and inferior courts by Section 1, "shall extend to all Cases, in Law

and Equity, arising under this Constitution, the Laws of the United States, and treaties made . . . under their Authority."

By these provisions the purpose hardly is to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed.³⁴ If the validity of the order, on constitutional or other grounds, has any substantial relationship to the petitioners' guilt, and it cannot be denied that it does, the short effect of the procedure is to chop up their trial into two separate, successive and distinct parts or proceedings, in each of which only some of the issues determinative of guilt can be tried, the two being connected only by the thread of finality which runs from the decision of the first into the second. The effect is to segregate out of the trial proper issues, whether of law or of fact, relating to the validity of the law for violation of which the defendants are charged, and to leave to the criminal court only the determination of whether a violation of the regulation as written actually took place and whether in some other respect the statute itself is invalid. If Congress can remove these questions, it can remove also all questions of validity of the statute or, it would seem, of law.

The consequences of this splitting hardly need further noting. On facts and issues material to validity of the regulation, the persons charged are deprived of a full trial in the state or district where the crime occurs, even if the Emergency Court sits there, as

³⁴ Nor, according to accepted notions of the criminal process, has it ever been contemplated that some of the issues of fact should be provable by confrontation of witnesses and others by written evidence only, when other evidence is or may be available. If, for instance, Congress should define an act as a crime, but should require that in the trial issues relating to the validity of the law furnishing the basis for the charge should be proven only by affidavit, though others, by the normal processes of proof, the proceeding hardly could be held to comport with the kind of trial the Constitution, and more particularly the Sixth Amendment requires. And if Congress should go further and provide for determination of the issues triable only by affidavit in a court or other body sitting elsewhere than in the state and district of the crime, with other issues triable before a court with a jury, empanelled there, but with that court compelled to give finality to the other's findings against the accused, the departure from constitutional requirements would seem to be only the more obvious. This is not far in effect, if it is at all, from what has been done here.

it is not required to do. Their right to try those constitutional issues both of fact and of law on which a criminal conviction ultimately will hinge, is restricted rigidly to the introduction of written evidence before the administrator in a proceeding barely adequate, even under special circumstances like these, to meet the requirements of due process of law in civil proceedings. The court which makes the decision on these issues cannot consider the facts constituting the violation. It has no power to pass judgment of guilty or not guilty upon the whole of the evidence. It can only pronounce the law valid or invalid in a setting wholly apart from any charge of crime, from the facts alleged as its commission, and from the usual protections which surround its trial.

On the other hand the special tribunal's judgment, rendered it may be on disputed facts as well as law, becomes binding against the accused, in the later proceeding. He cannot then dispute it, regardless of whether meanwhile the facts have changed³⁵ or new and additional evidence has been discovered and might be tendered with conclusive effect, if it were admissible. He can tender no evidence on what may be the most vital issue in his case and one, it may likewise be, that the evidence then available would sustain overwhelmingly. The trial court must shut its eyes to all such offers of proof and, moreover, to any such issue of law.

VI.

A procedure so piecemeal, so chopped up, so disruptive of constitutional guaranties in relation to trials for crime, should not and, in my judgment, cannot be validated, as to such proceedings, under the Constitution. Even war does not suspend the protections which are inherently part and parcel of our criminal process. Such a dissection of the trial for crime could be supported, under our system, only upon some such notions as waiver and estoppel or *res judicata*, whether or not embodied in legislation.³⁶ These too are strange and inadequate vehicles for trying whether the citizen has been guilty of criminal conduct. They bar defense, while keeping prosecution open,

³⁵ His only remedy is to begin a new protest proceeding [§ 203(a)], which is not only as limited in character as the original one, but under the administrator's procedural regulations must be "filed within . . . sixty days after the protestant has had, or could reasonably have had, notice" of the changed facts. Revised Procedural Regulation 1, § 1300.26. Cf. notes 29, 30 *supra*.

³⁶ Cf. note 22 *supra*.

before it begins. *Res judicata*, by virtue of a judgment in some prior civil proceeding, where different constitutional guaranties relating to the mode and course of trial have play, has not done duty heretofore to replace either proof of facts before a jury or decision of constitutional questions necessary to make up the sum of guilt in the criminal proceeding itself. Congress can invade the judicial function in criminal cases no more by compelling the court to dispense with proof, jury trial or other constitutionally required characteristics than it can by denying all effect of finality to judicial judgments. Cf. *Schneiderman v. United States*, 320 U. S. 118, concurring opinion at 167-168. And while, as noted above, notions of waiver and estoppel have had place in criminal proceedings to an extent not wholly defined, in some instances harshly and artificially,³⁷ they have not had effect heretofore to enable Congress to force a waiver of defense upon the individual by offering a choice between two kinds of trial, neither of which satisfies constitutional requirements for criminal trials. Certainly when the consequences are so novel and far reaching as they may be under this procedure, both for the individual and for the judicial system, these conceptions should not be given legal establishment to bring them into being.

To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake. The question is not merely whether the protest proceeding is adequate in the constitutional sense for some of the purposes pertinent to that proceeding. It is rather what effect shall be given to the civil determination in the later and entirely different criminal trial. It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose the accused from having them decided in that trial and thereby deprive him of the protections in trial guaranteed all persons charged with crime and thus of full and adequate defense. It is not the equivalent of that sort of defense to force one to initiate a curtailed civil suit or to cut him off shortly from all defense on the issues allocated to it, if he does not do so. Again, the question is not merely whether the individual can waive his constitutional trial of the issue of validity. It is rather whether Congress can force him

³⁷ Compare *Johnson v. Zerbst*, 304 U. S. 458; *Glasser v. United States*, 315 U. S. 60; with *Patton v. United States*, 281 U. S. 276; *Adams v. United States ex rel. McCann*, 317 U. S. 269.

to do so in the manner attempted and, beyond this, whether he and Congress together, in the combined effects of what they do, can so strip the criminal forum of its power and of its duty to abide the law of the land. And if the issue is further whether Congress can do this in some situations, respecting some issues, under more usual safeguards, the question requires attention to these important limitations.³⁸

The procedural pattern is one which may be adapted to the trial of almost any crime. Once approved, it is bound to spawn progeny. If in one case Congress thus can withdraw from the criminal court the power to consider the validity of the regulations on which the charge is based, it can do so for other cases, unless limitations are pointed out clearly and specifically. And it can do so for statutes as well. In short the way will have been found to avoid, if not altogether the power of the courts to review legislation for consistency with the Constitution,³⁹ then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control or definition of jurisdiction. It is rather unwarranted abridgement of the judicial power in the criminal process, unless at the very least it is confined specifically to situations where the special proceeding provides a fair and equal substitute for full defense in the criminal trial or other adequate safeguard is afforded against punishment for violating an order which itself violates or may violate basic rights. So much should not be accomplished merely by giving to the failure to take advantage of opportunity for summary civil determination, coupled with a short statute of limitations upon its availability, the effect of a full and final criminal adjudication. To do this hardly observes the substance of "adequacy" in criminal trials.

From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order invalid on its face. Any other view would permit Congress to compel the courts to enforce unconstitutional laws. Nor, in my opinion, can Congress forbid consideration of validity in all cases, if it can in any, where

³⁸ Cf. note 41 *infra*.

³⁹ Cf. McLaren, Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions? (1944) 30 A. B. A. J. 17.

the invalidity appears only from proof of facts extrinsic to the regulation. Again the racial or religious line is obvious and pertinent. If, for instance, one charged criminally with violating the regulation should tender proof it was being enforced in a manner to deny him the equal protection of the laws, because of his racial or religious connections, it is difficult to believe the evidence could be excluded consistently with the judicial obligation. The Constitution does not make judicial observance or enforcement of its basic guaranties depend on whether their violation appears from the face of legislation or only from its application to proven facts. *Snowden v. Hughes*, No. 57, this Term; *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-154.

For legislation not void on its face, a presumption of constitutionality attaches and remains until it is proven invalid or so in operation. In such cases there is no unfairness, nor any invasion of the court's paramount obligation, in requiring one who would avoid the regulations' impact to show they are not what they appear to be or that they are made to operate otherwise than as they purport or were intended. But it is one thing to say that burden must be borne within the enforcement proceeding itself and another to say it must be carried entirely outside it. To require the defendant to prove invalidity in such a situation in the criminal trial itself, upon a showing of violation of the statute, is wholly permissible. But for the court to be unable to receive tendered evidence which might disclose the statute's invalid character and effect, is quite different. Certainly, under the circumstances of this case, it would seem to be as much a violation of individual right and as much an invasion of the judicial function for Congress to command the court not to receive the evidence, regardless of its character or effect, as for it to direct the court to enforce a law or an order void on its face.

VII.

✓ To sanction conviction of crime in a proceeding which does not accord the accused full protection for his rights under the Fifth and Sixth Amendments, and which entails a substantial legislative incursion on the constitutionally derived judicial power, if indeed this ever could be sustained, would require a showing of the greatest emergency coupled with an inability to accomplish the substantive

ends sought in any other way. No one questions the seriousness of the emergency the Price Control Act was adopted to meet. And it has been urged with great earnestness that the nation's security in the present situation requires that the statute's procedure, followed in this case, be sustained to its full extent.

That argument would be more powerful if enforcement of the statute, and thus maintenance of price control, were dependent upon accepting every feature. No doubt to impose the criminal sanction as has been done in this case implements the enforcement process with the deterrent effects which usually accompany that sanction. But neither its use nor enforcement of the statute's substantive prohibitions requires that the criminal court shall not consider the validity of the regulations.

With the arsenal of other valid legal weapons available, there can be no lack of speedy and effective measures to secure compliance. The regulations are effective until invalidated. They cannot be suspended by any court, pending final decision here, if the last source of relief is sought. All the armory of equity, and with it the sanctions of contempt, are available to keep the regulations in force and to prevent violations, at least until decision here is sought and had that the regulations are invalid. The same weapons are available to enforce them permanently if they are found valid. Apart from defense when charged with crime, the individual's only avenue of escape, and that not until final decision of invalidity has been made, is by protest and appeal through the single route prescribed. Finally, in addition to all this, the dealer may be punished for crime if he violates the regulation wilfully and cannot show it is invalid either in his defense or by securing a judgment to this effect through the protest procedure. In either case, in view of the statute's curtailment of his substantive rights and the consequent increase in the burden of proving facts sufficient to nullify the regulation,⁴⁰ his chance for escape becomes

⁴⁰ That burden is heavy, as this case illustrates. Petitioners attacked the regulation's constitutionality on the ground that, by compelling them to sell at prices less than cost, it deprived them of their property without due process of law. And, on the same ground, they urged the regulation violates the statute's requirement that the price fixed allow margins which are "generally fair and equitable." But the Fifth Amendment does not insure a profit to any given individual or group not under legal compulsion to render service, where doing so would contravene an enacted policy of Congress sustainable on a balance of public necessity and private hardship. Cf. the Court's opinion herein and authorities cited; also *Bowles v. Willingham*, No.

remote, to say the least. In view of all these resources and advantages, the assertion hardly is sustained that enforcement requires also depriving the accused of his opportunity for full and adequate defense in his criminal trial.

War requires much of the citizen. He surrenders rights for the time being to secure their more permanent establishment. Most men do so freely. According to our plan others must do so also, as far as the nation's safety requires. But the surrender is neither permanent nor total. The great liberties of speech and the press are curtailed but not denied. Religious freedom remains a living thing. With these, in our system, rank the elemental protections thrown about the citizen charged with crime, more especially those forged on history's anvil in great crises. They secure fair play to the guilty and vindication for the innocent. By one means only may they be suspended, even when chaos threatens. Whatever else seeks to dispense with them or materially impair their integrity should fail. Not yet has the war brought extremity that demands or permits them to be put aside. Nor does maintaining price control require this. The effect, though not intended, of the provision which forbids a criminal court to "consider the validity" of the law on which the charge of crime is founded, in my opinion, would be greatly to impair these securities. Hence I cannot assent to that provision as valid.

464, decided this day. And in this case both the statute's basic purpose and its terms, as well as the legislative history, cf. Sen. Rep. No. 931, 77th Cong., 2d Sess. 15, show that Congress intended to forbid only a price so low that the trade in general, not merely some individual dealers or groups, could not have the margin prescribed. *Bowles v. Willingham, supra*. Petitioners' offers of proof, in this respect, which the trial court rejected, went only to show that they, or at most the meat wholesalers of Boston, could sell beef only at a loss. Harsh as this may seem in individual instances, it was Congress' judgment that the interests of dealers who could not operate profitably at a level of prices permitting a fair margin generally to the trade, would have to give way, in the acute prevailing circumstances, to the paramount national necessity of keeping prices stabilized and that judgment, by virtue of those circumstances, was for Congress to make. Accordingly the tendered proof hardly was sufficient to raise an issue of confiscation giving ground for setting aside the regulation.

It is likely that by far the greater number of challenges would arise on grounds of supposed confiscation, in which this burden would have to be met. Once it is made clear just what that burden is, the fear hardly seems justified that enforcement would swamp the agency with litigation. In any event the remedy for that would be by providing a more adequate enforcing staff, not by cutting off defense to criminal prosecutions based on invalid orders.

Different considerations, in part at any rate, apply in civil proceedings.⁴¹ But for the trial of crimes no procedure should be approved which dispenses with trial of any material issue or splits the trial into disjointed segments, one of which is summary and civil, the other but a remnant of the ancient criminal proceeding.

The judgment should be reversed.

I am authorized to say that Mr. Justice MURPHY joins in this opinion.

⁴¹ Cf. concurring opinion in *Bowles v. Willingham*, No. 464, decided this day. Limitations applicable solely to criminal proceedings fall to one side. Giving the decision in the special proceeding, or failure to seek it after reasonable opportunity, the effect of *res judicata* in later civil proceedings does not therefore deprive the party affected of opportunity for full and adequate defense in his criminal trial, where not only his rights of property, but his liberty or his life may be at stake.

However widely the character of the special remedy may be varied to meet different urgencies, with consequences of foreclosure for civil effects, the foreclosure of criminal defense should be allowed, if at all, only by a procedure affording its substantial equivalent, in relation to special constitutional issues and in such a manner that the failure to follow it reasonably could be taken as an actual, not a forced waiver. Thus, possibly foreclosure of criminal defense could be sustained, when validity turns on complex economic questions, usually of confiscatory effects of legislation, and proof of complicated facts bearing on them. But, if so, this should be only when the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings, so that, if followed, the party would have a substantial equivalent to defense in a criminal trial. And the opportunity should be long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender. So safeguarded, the foreclosure of such questions in this way would not work a substantial deprivation of defense.

In respect to other questions, such as the drawing of racial or religious lines in orders or by their application, of a character determinable as well by the criminal as by the special tribunal, in my opinion the special constitutional limitations applicable to federal criminal trials, and due enforcement of some substantive requirements as well, require keeping open and available the chance for full and complete defense in the criminal trial itself.